

GUIDE TO FAR CHANGES

PURSUANT TO FASA AND OTHER ACQUISITION REFORMS

(Federal Acquisition Circulars 90-26 Through 90-33)

October 18, 1995

*Prepared by the Federal Acquisition Institute (FAI) and Acquisition Reform
Communication Center (ARCC), Defense Acquisition University (DAU)*

References

The *Contract Specialist Workbook (CSW)* is a publication of the Federal Acquisition Institute (FAI), available from the FAI Home Page on the World Wide Web. Office of Federal Procurement Policy Letter 92-3 establishes the Workbook as a Governmentwide standard for training the contracting workforce.

FAR is the “Federal Acquisition Regulation”.

FASA is the “Federal Acquisition Streamlining Act”.

FAC is the acronym for “Federal Acquisition Circular”. *FACs* convey loose-leaf change pages to subscribers of the Federal Acquisition Regulation (*FAR*).

Conventions

Functions are described as performed by Federal contracting officers and specialists.

A parenthetical reference is provided for each teaching point. Section numbers (e.g., §14.201-6) are from the Federal Acquisition Regulation (*FAR*). The related Federal Acquisition Circular (*FAC*) is identified by its number (e.g., *FAC* 90-29). The case number is that assigned to the particular rule. The *CSW* Unit and Task numbers refer to Units of Instruction and tasks from the Contract Specialist Workbook.

Icons



Changes related to streamlining the acquisition of commercial items.



Changes in policies related to audits, cost principles, pricing information, and related certifications.



Changes related to evaluating contractor past performance.



Changes to support electronic commerce.



Other changes.

For More Information

The Deputy Undersecretary of Defense for Acquisition Reform has arranged for the publication of an unofficial “Before/After *FAR*” — with strikethroughs and bold letters to indicate respectively deletions and additions made to the *FAR* by *FACs* 90-26 through 90-33. This and other documents related to acquisition reform can be obtained from the following sources.

- The FAI Home Page on the World Wide Web:
<http://www.gsa.gov/staff/v/training.htm>
- The DAU Home Page on the World Wide Web:
<http://www.acq.osd.mil/dau/dau.html>

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FEDERAL ACQUISITION SYSTEM

PROCESS MAP

Explanation

The following pages map the primary phases, steps, and functions of the Federal acquisition process. Checkmarks identify functions affected by changes to the FAR published in FACs 90-26 through 90-33. Those FACs conveyed change pages to the FAR that incorporate most provisions of FASA as well other important acquisition reforms (e.g., changes in policies regarding “past performance”).

Caveats

The map represents one view of the best order for teaching steps and functions.

Do not regard the map as a typical or ideal flowchart of events in the acquisition process. The map’s ordering of steps and functions only roughly corresponds to the chronological order of events in actual acquisitions. In reality, there is no predetermined order for making acquisition decisions or performing acquisition functions. Functions generally overlap in time and space and rarely are performed in the same order from one acquisition to another. For example, contracting officers amend some solicitations prior to opening proposals, as suggested by the map. Contracting officers amend other solicitations after the closing date for proposals. Moreover, not every step and function occurs in every acquisition. Many contracts are not modified, and few are terminated.

Several agencies, most notably the National Aeronautics and Space Administration, use alternative source selection procedures for large acquisitions. Such source selection procedures may depart markedly from the map’s ordering of functions.

Additional Information

For more information on each function, see the Federal Acquisition Institute (FAI) “Contract Specialist Workbook”. For each function, the Workbook identifies related duties and tasks of Federal contract specialists (including standards for performing the tasks), along with flowcharts and tables of FAR cross-references. The Workbook is the primary source of the competencies covered by contracting courses of the Defense Acquisition University, the General Services Administration Interagency Training Center, and other Federal procurement training and educational facilities. You may download the Workbook from the FAI Home Page:

<http://www.gsa.gov/staff/v/training.htm>

FEDERAL ACQUISITION SYSTEM — VISION, STANDARDS, AND STRATE- GIES

The Vision

Deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. View best value from a broad perspective, balancing the many competing interests in the System. [FAR 1.102 through 1.102-4, FAC 90-29, CSW Unit 79]

Standards for Performance

The following standards apply to all acquisition officials — contracting officers and specialists, purchasing agents, contracting officer representatives, program managers, technical evaluators, quality assurance specialists, logisticians, and the like. Always have these standards in mind when performing any specific acquisition-related function, duty, or task. [FAR 1.102 through 1.102-4, FAC 90-29, CSW Unit 79]

1. Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service.

Principal customers are the line managers and other users of acquired supplies and services (acting on behalf of the nation's taxpayers). Be responsive to customer needs, concerns, and feedback.

2. Minimize administrative operating costs.

To the extent that you are responsible for rules, policies, and procedures — question whether their benefits clearly outweigh the costs of their development, implementation, administration, and enforcement. If not, alter or abolish them.

3. Conduct business with integrity, fairness, and openness.

Every acquisition official is responsible and accountable for the wise use of public resources as well as for acting in a manner which maintains the public's trust. The actions of every acquisition official must reflect integrity, fairness, and openness.

4. Fulfill public policy objectives.

Strive to attain the public policy goals established by Congress and the President.

FEDERAL ACQUISITION SYSTEM — VISION, STANDARDS, AND STRATE- GIES

Strategies for Meeting System Standards

- *Shift the focus from “risk avoidance” to “risk management”.* The costs of eliminating all risk would greatly outweigh any benefits.
- *Forecast requirements and develop long-range plans for accomplishing them.* The extent of planning should be commensurate with the size and nature of the acquisition. In carrying out such plans, be flexible in accommodating changing or unforeseen mission needs.
- *Team with other participants in the acquisition process.* Participants include not only representatives of the technical, supply, and procurement communities but also their customers and their suppliers.
- *Empower participants to make decisions within their area of responsibility.* Delegate authority to make decisions (and accountability for the decisions) to the lowest level within the acquisition system, consistent with law. In particular, the contracting officer must have the authority, to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies.
- *Encourage innovation and local adaptation.* Assume that any strategy, practice, policy or procedure is a permissible exercise of authority if (a) in the best interests of the Government and (b) NOT prohibited by the FAR, law (statutory or case law), Executive order or other regulation
- *Communicate with the commercial sector as early as possible in the acquisition cycle.* Among other purposes, this can help acquisition officials become aware and take advantage of capabilities available in the commercial marketplace.
- *Foster cooperative relationships between the Government and its contractors.* Do this consistent with the Government’s overriding responsibility to the taxpayers.
- *Maximize the use of commercial products and services in meeting Government requirements.*
- *Select contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.*
- *Promote competition.*
- *Train and educate.* Provide training, professional development, and other resources to maintain and improve the knowledge, skills, and abilities of acquisition officials, both with regard to their particular acquisition-related duties and their respective roles as members of acquisition teams. The contractor community is encouraged to do likewise. [FAR 1.102 through 1.102-4, FAC 90-29, CSW Unit 79]

GENERAL CHANGES

Small Business Policies

Labor Surplus Area Concerns — An Old Preference Mostly Eliminated

☞ FAR Part 20 has been deleted (and is now reserved). Also deleted are related clauses in FAR Part 52. FAR 19.001 now includes the definitions of “labor surplus area” and “labor surplus area concerns.” [FAC 90-32, Case 94-780]

☞ Contracting officers will continue to provide consideration to labor surplus area small business concerns ONLY as a tie breaker in the event of equal low bids. The first tie breaker remains “Small business concerns that are also labor surplus area concerns”. However, when the tie bids are both from “other than small business concerns”, the advantage NO longer goes to the labor surplus area concern. Coverage of the role of labor surplus concerns as a factor in tie breaking can be found in §14.407-6, §19.202-3, §19.304, and §52.219-2. [FAC 90-32, Case 94-780, CSW Unit 33, Task 8]

☞ The fact that a firm is a “labor surplus area concern” NO LONGER MATTERS when performing other functions and tasks, such as the following. [FAC 90-32, Case 94-780]

- *Set-Asides* — Determining the type of set-aside (if any) to establish. [§6.203, §19.508, and §52.219-7 CSW Unit 10, Tasks 3 and 5]
- *Acquisition Planning* — Contents prescribed by §7.105. [CSW Unit 2, Task 4]
- *Multi-Year Contracting* — Ability to use multi-year terms and conditions under §17.104-1. [CSW Unit 4, Task B1]
- *Sources* — Rotating excessively long bidder mailing lists as provided in §14.205-4. [CSW Unit 9, Task B5]
- *Method of Procurement* — Determining whether or not to use two-step sealed bidding as provided in §14.502(b). [CSW Unit 17, Task 4]
- *Selecting the Type of Contract to Solicit* — Documenting the rationale for the type of contract selected. [CSW Unit 19.1, Task 7]
- *Publicizing Proposed Procurements* pursuant to §5.002, 5.207, 5.503, and 5.404-1. [CSW Unit 25, Task 4]
- *Bid Prices and Price Analysis* — applying Buy American preferences pursuant to FAR §25.105 and §25.404 [CSW Unit 33, Task 2 and Unit 37, Task 3]
- *Cost Analysis* — Establishing objectives for profit or fee pursuant to §15.905-1(c). [CSW Unit 40, Task 10]
- *Make-or-Buy Programs* — Factors to consider in evaluating proposed programs under §15.705(b) and 706(d)(4). [CSW Unit 48, Tasks A4 and C3]
- *Subcontracting Plans* under FAR Subpart 20.3. [CSW Unit 48, Tasks A1 and A3]
- *Consent to Subcontracts* — Identifying changes or corrections (if any) in subcontracting procedures that the contractor should make as a condition for consent. [§44.202-2 and §44.303, CSW Unit 57, Tasks B2 and B5]

GENERAL CHANGES

Women-Owned Small Business Concerns — Greater Encouragement for their Participation in Federal Acquisitions

☞ The FAR at 19.001 includes a new definition for the term “*Women-owned small business concern*” —

“... a small business concern (i) which is at least 51 percent owned by one or more women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and (ii) whose management and daily business operations are controlled by one or more women”.

This definition also appears in the provision at FAR 52.219-1, “Small Business Program Representations”, §52.219-8, “Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns”, and at FAR 52.212-3, “Offeror Representations And Certifications - Commercial Items”. [FAC 90-32, Case 94-780]

☞ The FAR requires contracting officers to negotiate a separate percentage goal in subcontracting plans for women-owned small business concerns. Contractors are liable for liquidated damages if they fail to attain those goals on the same basis and under the same conditions that they are liable for failing to attain goals for subcontracting with small disadvantaged businesses and small businesses generally. Contracting officers also may negotiate monetary incentives for exceeding goals for subcontracting with women-owned small business concerns pursuant to the clause at FAR §52.219-10. [§19.702, §19.704, §19.708, §42.302, §52.219-9, and §52.219-10, FAC 90-32, Case 94-780, CSW Unit 48 Tasks A1, A2, A2.1, and B4]

☞ When performing the **following** functions, the FAR requires contracting officers to separately consider the interests of women-owned small business concerns (kindred to the consideration provided to the interests of small disadvantaged business concerns and to small business concerns generally). [FAC 90-32, Case 94-780]

- *Acquisition Planning* — Preparing acquisition plans under §7.105 and implementing the policy in §19.201(a) of providing “maximum practicable opportunities in its acquisitions to small business concerns, small disadvantaged business concerns, and women-owned small business concerns”. [CSW Unit 2, Task 4]
- *Market Research* — in terms of the obligation of heads of contracting activities to ensure that “contracting and technical personnel maintain knowledge of small, small disadvantaged, and women-owned small business program requirements and take all reasonable action to increase participation in their activities’ contracting processes by these businesses”, pursuant to §19.201(b) and §19.402. [CSW Unit 5, Task 1]
- *Sources* — Maintaining and rotating offeror mailing lists as provided in §14.205-4. [CSW Unit 9, Tasks B2 and B5; Unit 10, Task 2]
- *Publicizing Proposed Procurements* — in terms of providing notice to firms pursuant to §5.002 and §5.503. [CSW Unit 25, Task 4]
- *Cost Analysis* — Establishing objectives for profit or fee pursuant to §15.905-1(c). [CSW Unit 40, Task 10]

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- *Responsibility* — Considering past performance pursuant to §9.104-3(c), in terms of accomplishing goals for subcontracting with women-owned businesses in subcontracting plans. [CSW Unit 47, Task 8]
- *Protests to SBA of Eligibility for a Set-Aside* — Under §19.301 and §19.703, taking action against a firm that has misrepresented itself to obtain a subcontract under a subcontracting plan. [CSW Unit 52, Task E5]
- *Make-or-Buy Programs* — Factors to consider in evaluating proposed programs under §15.705(b) and 706(d)(4). [CSW Unit 48, Tasks A4 and C3]
- *Post-Award Orientations* — Factors to consider in determining whether an orientation is necessary under §42.501 and §42.502. [CSW Unit 55, Task 1]
- *Consent to Subcontracts* — Identifying changes or corrections (if any) in subcontracting procedures that the contractor should make as a condition for consent pursuant to §44.202-2 and §44.303. [CSW Unit 57, Tasks B2 and B5]

Small Business Representations Consolidated

☞ As prescribed by FAR §19.202-5 and §19.304, the new provision at FAR 52.219-1, “Small Business Program Representations”, replaces the following prior provisions:


- 52.219-1, Small Business Concern Representation.
- 52.219-2, Small Disadvantaged Business Concern Representation.
- 52.219-3, Women-Owned Small Business Representation.
- 52.219-22, SIC Code and Small Business Size Standard. [FAC 90-32, Case 94-780]


Small Business Specialists — The New Title


☞ The FAR now uses the title “Small Business Specialists” in lieu of the old “Small and Disadvantaged Business Utilization Specialists”. [94-780, §6.501, §19.201(d), and §19.506, Case 94-780]

GENERAL CHANGES

Electronic Contracting Policies

 To support paperless transactions, the FAR allows the use of electronic signatures. Moreover, the words “in writing” or “written”, as used in the FAR, do not necessarily refer to paper documents — the words apply equally to electronic files transmitted and stored on magnetic or optical media. (§2.101, FAC 90-29, Case 91-104)

 The FAR no longer requires contracting officers to make paper copies and stamp those copies with the words “DUPLICATE ORIGINAL” — as being the only copies of executed documents that have the same force and effect as signed originals. (§4.101 and 4.201, FAC 90-29, Case 91-104)

 Agencies and the public may computer generate both standard and optional forms prescribed by the FAR if:

- The form is in an electronic format that complies with Federal Information Processing Standard Number 161, or
- There is no change to the name, content, or sequence of the data elements, and the form carries the Standard or Optional Form number and edition date. (§52.105, FAC 90-29, Case 91-104).

FUNCTION BY FUNCTION CHANGES

Acquisition Planning

Contract Specialist Workbook, Unit of Instruction 2

New Goal for Acquisition Planning — Buy Commercial



The FAR establishes a new principal goal for acquisition planning: Acquire commercial and (to the extent available commercial items are not suitable) Nondevelopmental Items (NDI) to the maximum extent practicable. (§7.102, §7.103, and §7.105, FAC 90-32, Case 94-790, CSW Unit 2, Task 4)

Definition of commercial item (§2.101)



The definition of “commercial item” is very broad and goes well beyond past definitions. As now defined, all of the following are considered to be commercial items (including some types of services). [§2.101 and §52.202-1, FAC 90-32, Case 94-790, CSW Units 2 and 7]

1. Any item (excluding real property) that is of a **type** customarily used for nongovernment purposes and that—
 - Has been sold, leased, or licensed to the general public; or,
 - Has been offered for sale, lease, or license to the general public.
2. Any item evolving from an item described in paragraph (1) through advances in technology or performance that will be available in the commercial marketplace in time to satisfy delivery requirements under the Government solicitation.
3. Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, BUT FOR
 - Modifications of a type customarily available in the commercial marketplace, AND/OR
 - Minor modifications of a type not customarily available in the commercial market place made to meet Federal Government requirements.
4. Any combination of items meeting the requirements of paragraphs (1) through (3) that are of a type customarily combined and sold in combination to the general public.

FUNCTION BY FUNCTION CHANGES

5. Installation, maintenance, repair, training, and other services to support a commercial item, if the source of such services —
 - Offers the services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and
 - Offers to use the same work force for servicing the Government that it uses in providing those services to the general public.
6. Commercial services of a **type**:
 - Offered and sold competitively
 - In substantial quantities in the commercial marketplace
 - Based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions.
7. Any commercial item, combination of commercial items, or commercial service as defined above transferred between or among separate divisions, subsidiaries, or affiliates of a contractor (i.e., interorganizational transfers).
8. NDI developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.



A minor modification is one that “does not alter significantly the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process”. In determining whether a modification is minor, consider the value and size of the modification vs. the value and size of the final product. However, treat dollar values and percentages as guides rather than as conclusive evidence in making this determination. [§2.101, FAC 90-32, Case 94-790]



Commercial items do NOT include services that are sold based on hourly rates. [§2.101, FAC 90-32, Case 94-790]



Definition of nondevelopmental item (§2.101)


- Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, State or local Government, or a Foreign Government.
- Any above item that requires only:
 - ◊ Minor Modifications; AND/OR
 - ◊ Modifications of a type customarily available in the commercial marketplace.
- Any item of supply being produced that does not meet the criteria above solely because the item is not yet in use.

FUNCTION BY FUNCTION CHANGES

Funding

Contract Specialist Workbook, Unit of Instruction 4

Funding Service Contracts Across Fiscal Years


 In title 41 agencies (i.e., agencies other than DoD, NASA, and Coast Guard), contracting officers may execute service contracts (or an order under a task order contract or an option) for a period of performance that begins in one fiscal year and ends in the following fiscal year — with the contract entirely funded out of the first year’s appropriations. However, the period of performance for the contract, order, or option so funded may not exceed twelve months. Using this authority, for example, a contracting officer could write a contract for performance beginning on July 1, 1999 and ending on June 30, 2000 — and fund all work under the contract out of a fiscal year 1999 appropriation.

For similar authorities, see the FAR Supplements of the Department of Defense (DoD), United States Coast Guard, and the National Aeronautics and Space Administration. [§32.703-3 and 37.106, FAC 90-30, Case 94-766, CSW Unit 4A, Task 2]


Market Research

Contract Specialist Workbook, Unit of Instruction 5

Market Research Defined


 Market research means “collecting and analyzing information about capabilities within the market to satisfy agency needs”. [§2.101, FAC 90-32, Case 94-790, CSW Unit 5]


When Market Research Must Be Performed

 At minimum, market research is required (1) before developing new requirements documents and (2) before soliciting offers. [§10.001(a)(2), FAC 90-32, Case 94-790, CSW Unit 5]


Ideally, contracting officers should partner with requiring activities on market research as soon as requirements are forecast, as part of acquisition planning. If not possible prior to this point, contracting officers should begin market research upon receipt and acceptance of purchase requests. Additional research is often performed during the solicitation and evaluation phases, as new information becomes available and decisions are made.

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 Market research is required under the Simplified Acquisition Threshold only when adequate information is not available and the circumstances justify its cost. [§10.001(a)(2), FAC 90-32, Case 94-790, CSW Unit 5]

 Extent and documentation of the market research may vary, based on such factors as urgency, estimated dollar value, and complexity. [§10.001(b)(1) and (e), FAC 90-32, Case 94-790, CSW Unit 5]


Types of Information to Collect

 The FAR requires market research to identify available commercial items or NDI that --

- Can meet requirements;
- Can be modified to meet requirements; or
- Could meet the requirements if modified within reason.

 The FAR further requires market research to:

- Identify capable sources (or determine that none exist).
- Determine the extent to which commercial items or NDI could be incorporated at the component level.
- Identify the **customary** practices of commercial firms (e.g., warranties, buyer financing, maintenance). The term “customary practice” is critical to the entire process of acquiring commercial items. Market research is the key to determining what in fact are “customary” terms and conditions for commercial contracts.
- Ensure maximum practicable use of recovered materials. [§10.001(a)(3), FAC 90-32, Case 94-790, CSW Unit 5, Task 9]

 Also collect information on:

- Customizing, modifying or tailoring practices.
- Terms such as warranty, buyer financing, discounts, etc.
- Laws and regulations unique to the item.
- Availability of items that contain recovered materials.
- Energy efficiency of available items.
- Distribution and support capabilities of suppliers.
- Size and status of potential sources. [§10.002(b)(1), FAC 90-32, Case 94-790, CSW Unit 5, Task 9]

FUNCTION BY FUNCTION CHANGES

Sources of Information



Collect market data by (among other means):

- Contacting knowledgeable individuals in Government and industry regarding market capabilities.
- Reviewing the results of recent market research.
- Publishing formal requests for information in technical or scientific journals and business publications.
- Querying Government and other databases.
- Participating in interactive, on-line communication with industry, acquisition personnel, and customers.
- Obtaining source lists from other agencies or associations.
- Reviewing catalogs and product literature, either published or on-line.
- Conducting interchange meetings or presolicitation conferences. [§10.002(b)(2), FAC 90-32, Case 94-790, CSW Unit 5, Tasks 2-8]

Researching market financing practices.



When performing market research, be alert for signs that buyers customarily finance sellers. If buyer financing appears to be a customary market practice, ascertain the:

- Extent to which other buyers provide contract financing for purchases in that market.
- Overall level of financing normally provided.
- Amount or percentages of any payments equivalent to commercial advance payments (as defined at §32.202-2).
- Basis for any payments equivalent to commercial interim payments (as defined at §32.202-2), as well as the frequency, and amounts or percentages.
- Methods of liquidation of contract financing payments and any special or unusual payment terms applicable to delivery payments. [§32.202-3, FAC 90-33, Case 94-764, CSW Unit 5, Task 9]



When performing market research, likewise be alert for signs that sellers customarily finance buyers. Since the Government cannot accept financing from sellers, the Government price should be correspondingly less than commercial prices that are based on seller financing. The Government pays on delivery. [CSW Unit 5, Task 9]

FUNCTION BY FUNCTION CHANGES

Requirements Documents

Contract Specialist Workbook, Unit of Instruction 6

Drafting and Reviewing Proposed Requirements Documents



The new term “requirements documents” replaces such terms as “purchase descriptions”. [§11.101, FAC 90-32, Case 94-790, CSW Unit 6]



The FAR directs agencies to:

- State requirements in terms of —
 - ◊ Functions to be performed;
 - ◊ Performance required; or
 - ◊ Essential physical characteristics
- Include restrictive provisions only to describe minimum needs. [§11.1 and 12.202, FAC 90-32, Case 94-790, CSW Unit 6, Task 5, and Unit 7, Task 3]



The FAR now also directs agencies to define requirements in terms that enable and encourage offerors to supply commercial items, or (to the extent that commercial items suitable to meet the agency's needs are not available) NDI, in response to the agency solicitations.

- Provide offerors of commercial items or NDI opportunity to compete in any procurement.
- Require primes and subs to incorporate commercial items or NDI as components.
- Restate requirements “in appropriate cases” to ensure that requirements can be met by commercial or NDI. To the extent practicable and consistent with FAR subpart 9.5, obtain feedback from potential offerors on draft requirements, requirements documents, and alternative approaches. [§11.002, FAC 90-32, Case 94-790, CSW Unit 6, Task 5, and Unit 7, Task 3]



Competition advocates now have a positive obligation to root out requirements documents and SOWs that needlessly inhibit the acquisition of commercial items. [§6.502, FAC 90-32, Case 94-790, CSW Unit 6, Task 9]

FUNCTION BY FUNCTION CHANGES

Order of Precedence



The FAR establishes a new “Order of Precedence” for requirements documents.

- Documents mandated by law.
- Performance-oriented documents:
 1. Nongovernment voluntary standards.
 2. Commercial item descriptions.
 3. Federal specifications and standards.
 4. Defense specifications and standards.
- Detailed Design-oriented documents:
 1. Nongovernment voluntary standards.
 2. Federal specifications and standards.
 3. Defense specifications and standards.
- Agency-unique standards, specifications for the non-repetitive acquisition of items. [§11.101, FAC 90-32, Case 94-790, CSW Unit 6, Task 4]

“Brand Name” Specifications



The FAR continues to discourage “Brand Name” specifications. Do not specify a manufacturer’s brand-name, product, or feature peculiar to one manufacturer (thereby precluding consideration of products from other firms) unless:

- Essential to the Government's requirements, and
- Market research indicates other products do not meet the agency’s minimum needs and cannot be modified for that purpose.


“Brand name” specifications continue to require the justifications and approvals necessary to contract absent full and open competition . [§11.104, FAC 90-32, Case 94-790, CSW Unit 6, Task 5]

Use of Other than New Materials



Draft requirements (especially packaging) to achieve “maximum practicable use of recovered and environmentally preferable materials” — including postconsumer materials. [§11.301(b), FAC 90-28, CSW Unit 6, Task 6 and Unit 7, Task 4]


FUNCTION BY FUNCTION CHANGES

 The FAR establishes a new “commerciality” test in determining whether to require contractors to use only new (or recycled) materials in their deliverables. [§11.301, FAC 90-32, Case 94-790, CSW Unit 6, Task 6 and Unit 7, Task 4]


Statements of Work / Contract Schedules

Contract Specialist Workbook, Unit of Instruction 7

Making the Commerciality Determination (NEW TASK)

 This determination is made prior to soliciting offers and WITHOUT asking prospective offerors to certify that their items are “commercial”. Instead, contracting officers evaluate requirements and determine if the requirements can be met by commercial items as defined in FAR §2.101. [§10.001(d), FAC 90-32, Case 94-790, CSW Unit 7]

Impact of Commerciality Determinations

 If market research establishes that the item or service can be met by a commercial item or service (as defined in §2.101), comply with the policies in FAR Part 12 to solicit offers and make award. If the Government requirement cannot be met by a type of item or service customarily available in the market place, the policies in Part 12 do NOT apply. [§10.001(d), FAC 90-32, Case 94-790, CSW Unit 7]

However, Part 12 does NOT apply to the acquisition of commercial items—

- At or below the micro-purchase threshold (see Subpart 13.6);
- Using the SF 44 (see section 13.505-3);
- Using the imprest fund (see Subpart 13.4); or
- Using the Governmentwide commercial purchase card (see Subpart 13.6).

The new FAR Part 12 was written to make the process of buying commercial items as similar as possible to that used by private sector buyers in commercial markets.

Questions are frequently asked about the relationship between FAR Part 12 policies and the policies and procedures in Parts 13, 14, and 15. When acquiring commercial items, contracting officers may use any of the traditional methods of procurement (i.e., simplified acquisition under FAR Part 13, sealed bidding under FAR Part 14, or negotiation under FAR Part 15). Depending

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on the method of procurement, contracting officers will solicit and evaluate quotes or offers for commercial items as prescribed in the applicable FAR Part (13, 14, or 15).

However, the policies in FAR Part 12 impose unique constraints on the award process (particularly on the drafting of the solicitation) and on terms and conditions in the resulting contract. For instance, FAR Part 16 permits the use of any type of contract when soliciting and awarding contracts under FAR Part 15. However, FAR Part 12 only allows firm fixed price contracts and fixed price contracts with economic price adjustment in contracts for commercial items regardless of the method of procurement. In such cases, the policies in FAR Part 12 overrule conflicting policies in other FAR Parts.

Services

Contract Specialist Workbook, Unit of Instruction 8

“Advisory and Assistance Services” Redefined

☞ Prior to FASA, the FAR defined “advisory and assistance services” as services to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of management systems. This definition at §37.201 has been combined with §37.203, *Types of Advisory and Assistance Services* (now deleted). The opening lines of the new definition reads as follows. [§37.201, FAC 90-33, Case 94-710, CSW Unit 8, Task A3]

*“Advisory and assistance services means those services provided under contract by nongovernmental sources to support or improve: **organizational** policy development; decision-making; management and administration; **program and/or project management and administration; or R&D activities.** It can also mean the **furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature).**”*

The material added to this definition from the deleted §37.203 has been streamlined (including elimination of an entire category — “individual experts and consultants.”).

☞ The list of exceptions has been reduced to three. [§37.202, FAC 90-33, Case 94-710, CSW Unit 8, Task A3]

- Routine Federal information processing services, unless they are an integral part of a contract for the acquisition of advisory and assistance services.
- Architectural and engineering services as defined in Section 901 of the Brooks Architect-Engineer Act (40 U.S.C. 541).
- Research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.

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Justifications and D&Fs Are No Longer Required Before Acquiring Most “Advisory and Assistance Services”

☞ Requiring activities NO longer have to certify requirements for advisory and assistance services. Requiring activities NO longer have to supplement purchase requests with written justifications of the need for such services. Requiring activities NO longer have to obtain written approval for the acquisition of advisory and assistance services by a higher level official. [§37.203(c); deletion of §37.206 and 207, FAC 90-33, Case 94-710, CSW Unit 8, Task A3]

☞ The FAR NO longer requires contracting officers to make written determinations on whether services are advisory and assistance. However, the Government still may NOT contract:

- To perform work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials.
- To bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures.
- On a preferential basis to former Government employees.
- Under any circumstances specifically to aid in influencing or enacting legislation.
- To obtain professional or technical advice which is readily available within the agency or another Federal agency. [§37.203(c); deletion of §37.206 and 207, FAC 90-33, Case 94-710, CSW Unit 8, Task A3]

Controls on Acquiring Services Related to Proposal Evaluation

☞ Agencies may NOT pay contractors for services related to conducting evaluations or analyses of any aspect of a proposal submitted for an initial contract award except under one of the following conditions. [§37.203(d), FAC 90-33, Case 94-710, CSW Unit 8, Task A3]

- The agency head determines in writing that “covered personnel” are not readily available either in the requesting agency or from another agency with adequate training and capabilities to perform the required proposal evaluation, OR
- The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDC’s contract meets the criteria of 35.017-3.


See “Procurement Planning”, Unit of Instruction 18, Part B, for more details.


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Sources


Contract Specialist Workbook, Unit of Instruction 9

Source Lists


 Contracting officers do not have to maintain paper or electronic solicitation mailing lists when their electronic commerce software (e.g., FACNET software) automatically transmits solicitations to all interested sources participating in electronic contracting with the contracting activity. [§14.205-1, FAC 90-29, Case 91-104, CSW Unit 9, Task B2]

 To the extent paper mailing lists continue to be maintained, the FAR clauses at §52.214-9 and §52.215-15 require firms to notify the contracting officer of their desire to continue receiving solicitations if they do not submit offers in response to a solicitation. Absent such notice, the FAR allows contracting officers to strike their names from the mailing list. The FAR will now permit offerors to deliver the notice electronically rather than on paper. [§14.201-6, 15.407, 52.214-9 and 52.215-15; FAC 90-29, Case 91-104, CSW Unit 9, Task B3]

Qualified Bidders, Manufacturers, and Product Lists

 When a business concern outside the applicable QBL, QML, or QPL expresses interest in an acquisition, the contracting officer must forward the concern's name and address to the agency activity which established the qualification requirement — whether or not the concern requests an actual copy of the solicitation. [§9.206-3, FAC 90-28, CSW Unit 9, Task C2]

New Limits On Interagency Acquisitions Under The Economy Act

 Before acquiring deliverables from other agencies under the Economy Act, the FAR continues to require (in somewhat different wording) a Determination and Finding (D&F) that:


- An interagency acquisition is in the best interest of the Government, and
- The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. (This second finding replaces the pre-FASA requirement for a finding that the acquisition conforms to the requirements of Subpart 7.3, Contractor Versus Government Performance for acquisitions involving the use of a commercial or industrial activity).

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Moreover, the FAR now reminds contracting officers that:


- The Economy Act may not be used by an agency to circumvent conditions and limitations imposed on the use of funds.
- Acquisitions under the Economy Act are not exempt from the requirements of Subpart 7.3, Contractor Versus Government Performance.

[§17.502 and §17.503, FAC 90-33, Case 94-710, CSW Unit 9, Tasks E1 and E2]

 If the service requested by an agency under the Economy Act requires a contract action by the servicing agency, the D&F must also include a statement that at least one of the following circumstances is applicable.

- The acquisition will appropriately be made under an contract of the servicing agency, entered into before placement of the order, which the servicing agency had established to meet its own needs for the same or similar goods or services.
- The servicing agency has capabilities or expertise to contract for such goods or services which are not available within the requesting agency.
- The servicing agency is specifically authorized by law or regulation to purchase such goods or services on behalf of other agencies. [§17.502 and §17.503, FAC 90-33, Case 94-710, CSW Unit 9, Tasks E1 and E2]

 Prepare the D&F prior to ordering supplies or services from another agency under the Economy Act. Furnish the D&F to the servicing agency if required by the latter. [§17.504, FAC 90-33, Case 94-710, CSW Unit 9, Task E2]

 Generally, the D&F is approved by the contracting officer in the requesting agency who has authority to contract for the goods or services (the agency head may designate some other official for that purpose). However, if the servicing agency is not covered by the FAR, the agency head may NOT delegate approval of the D&F below the senior procurement executive of the requesting agency. [§17.503(c), FAC 90-33, Case 94-710, CSW Unit 9, Task E2]

 If the servicing agency is not subject to the FAR, the requesting agency must verify that:

- Contracts used for its requirements include clauses that protect the Government from inappropriate charges (e.g., from paying costs that are unallowable under Part 31), and
- The servicing agency will adequately administer the contracts. [§17.505, FAC 90-33, Case 94-710, CSW new task]

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Set Asides

Contract Specialist Workbook, Unit of Instruction 10

☞ Contracting officers may NO longer set-aside a procurement for labor surplus area concerns or for small business concerns that are also labor surplus area concerns. [§6.203, §19.504, §19.508, §52.219-5, and §52.219-7, CSW Unit 10, Tasks 3 and 5]

Competition Requirements

Contract Specialist Workbook, Unit of Instruction 12

Changes In Exceptions to Full and Open Competition

☞ If a law enacted after the Streamlining Act directs awards to a contractor (or any other non-Federal entity), **IGNORE** that direction **UNLESS** the law **specifically**:

- Identifies the contractor (or other entity) **AND**
- References 10 U.S.C. 2304(j) for armed services acquisitions or section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions **AND**
- States that award to that contractor shall be made “in contravention of the merit-based selection procedures” in 10 U.S.C. 2304(j) or section 303(h) of the Federal Property and Administrative Services Act of 1949.

Exceptions:

- Comply with statutory direction to continue work being performed by the specified contractor under a contract awarded prior to FASA.
- Comply with statutory requirements to contract with the National Academy of Sciences to “investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.”

Purpose: This is an anti-pork barrel provision. In the past, Congress often directed sole source procurements through hidden, obscure provisions of law [§6.302-5, FAC 90-31, Case 94-701, CSW Unit 12, Task 1]

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☞ There is a new exception for acquiring the services of an expert for a current or “reasonably foreseeable” litigation or dispute. The Government may need their help when analyzing claims or requests for adjustments to contract terms and conditions. The Government also may need evaluators, fact finders, or witnesses for alternative dispute resolutions (ADR). Other potential users of this authority include the Internal Revenue Service (which may need this authority for such purposes as obtaining experts for reviewing tax records) and the Equal Employment Opportunity Commission (for such purposes as obtaining state and local assistance for compliance audits).

More importantly, this exception allows the Government to essentially name request a neutral mediator or arbitrator for ADR who is agreeable to both parties. [§6.302-3, FAC 90-31, Case 94-701, CSW Unit 12, Task 6] *See also “Publicizing Proposed Procurements” for a corresponding change to synopsis requirements.*

However, this exception does not authorize contracting officers to disregard other policies and procedures applicable to contracting for such services, such as policies governing conflict of interest or restrictions on contracting for inherently governmental functions.

New Reasons For Excluding Sources Prior To Full and Open Competition

☞ The following are additional reasons (over and above those previously in the FAR) for excluding a particular source to establish or maintain an alternative source or sources.

- Ensure the continuous availability of a reliable source of supplies or services.
- Satisfy projected needs based on a history of high demand.
- Satisfy a critical need for medical, safety, or emergency supplies. [§6.202, FAC 90-31, Case 94-701, CSW Unit 12, Task 9]

The Government is moving to Just In Time delivery in lieu of warehousing large stocks of supplies for contingencies. For example, DoD plans to buy tires from suppliers when needed rather than stockpiling tires. This requires a stable of suppliers ready and willing to quickly ramp up production for surges in demand due to war-time emergencies.

Justifications for Other Than Full and Open Competition

☞ When preparing justifications, the authors must demonstrate that they have conducted market research — not just a market survey. [§6.303-2, FAC 90-32, Case 94-790, CSW Unit 12, Task 11]

☞ Those who can approve a justification for a proposed contract over \$1,000,000 can also approve a justification for a proposed contract under that dollar amount. [§6.304, FAC 90-31, Case 94-701, CSW Unit 12, Task 12]

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Price-Related Evaluation Factors

Contract Specialist Workbook, Unit of Instruction 15

Options as a Price-Related Factor

✎ Options may be used as an evaluation factor only if the contracting officer determines that there is a reasonable likelihood that the options will be exercised. When soliciting sealed bids, put this determination in writing. This change in policy is in response to complaints from small businesses about having to price options that all too often are not exercised. [§17.202 and 17.208, FAC 90-31, Case 94-701, CSW Unit 15, Task 2]

Standard Price-Related Factors in Solicitations for Commercial Items

✂ When acquiring commercial items under FAR 52.212-1(h), “Instructions to Offerors - Commercial Items”, the Government reserves the right to:

- Award all line items to a single offeror.
- Make separate single awards for different line items (i.e., “the Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations”).
- Make multiple awards for the same line item (i.e., “to award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the offer”).

However, this can be changed by an addendum to the provision. (§52.212-1, FAC 90-32, Case 94-790, CSW Unit 15, Tasks 1-4]

✂ When acquiring commercial items under the provision at 52.212-2(b), the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. However, this does not obligate the Government to:

- Accept significantly unbalanced offers, or
- Exercise the option(s).


This also can be changed by an addendum to the provision. [§52.212-2, FAC 90-32, Case 94-790, CSW Unit 15, Task 2]

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Non-Price Evaluation Factors


Contract Specialist Workbook, Unit of Instruction 16 (formerly “Technical Evaluation Factors”)


Past Performance and Quality


 Contracting officers must evaluate “past performance” in every competitive negotiation if the estimated value of the requirement exceeds:


- \$1,000,000 for solicitations issued on or after July 1, 1995.
- \$500,000 for solicitations issued on or after July 1, 1997
- \$100,000 for solicitations issued on or after January 1, 1999.


Exception: You do not have to evaluate past performance if the contracting officer documents the rationale for disregarding past performance in the contract file. [§15.605, FAC 90-26, CSW Unit 16, Tasks 3 and 4]

 Contracting officers must also consider quality in **every** source selection, through inclusion in one or more non-price factors (e.g., past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance). [§15.605, FAC 90-26, CSW Unit 16, Tasks and 4]



 Cognizant technical officials are responsible both for technical and past performance requirements related to the source selection process. [§15.604, FAC 90-26, CSW Unit 16, Task 11]

 Generally speaking, agency officials have broad discretion when determining the sources and types of past performance information to evaluate — which should be tailored to the circumstances of the acquisition. [§15.608, FAC 90-26, CSW Unit 16, Tasks 3 and 4]


 When you plan to evaluate past performance, the solicitation shall afford an offeror the opportunity to identify existing or past contracts with terms and conditions similar to those in the solicitation. Contracting officers also may invite the offerors to provide information on problems encountered during performance of those contracts and steps being taken by any such offeror to correct the problems. [§15.608, FAC 90-26, CSW Unit 16, Task 13]

 You may instruct offerors to package and submit past performance data separate and apart from pricing information and, if needed, technical data. [§15.406-5 Part IV, FAC 90-26, CSW Unit 16, Task 13].


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  When past performance is an evaluation factor in FAR Part 12 solicitations for commercial items, §52.212-1, “Instructions to Offerors — Commercial Items”, requires offerors to include at minimum contract numbers, points of contact with telephone numbers, and other relevant information. [§52.212-1(b)(10), FAC 90-32, Case 94-790, CSW Unit 16, Task 13]

Environmental Objectives


 Contracting officers must consider “environmental objectives” in every source selection “where appropriate”. Possible objectives: “promoting waste reduction, source reduction, energy efficiency, and maximum practicable recovered material content”. [§15.605, FAC 90-27, CSW Unit 16, Tasks 3 and 4]

Award On Low Price or Cost

 The FAR reaffirms that contracting officers may continue to award contracts, where appropriate, on the basis of lowest [evaluated] price or cost to responsible offerors whose offers meet the solicitation’s minimum criteria for acceptable award. Remember to state this basis of award in the solicitation. [§15.605, FAC 90-31, Case 94-701, CSW Unit 16, Task 5]

 When awarding on the basis of lowest evaluated price or cost with consideration limited to offers that satisfy the solicitations’ minimum criteria for acceptable award, generally you may NOT use responsibility-related factors other than for responsibility determinations. Determinations of nonresponsibility regarding small business concerns are subject to “Certificate of Competency” review by the Small Business Administration. In best value source selections, a comparative assessment of such factors as past performance is distinct and different from the responsibility determination under FAR §9.103 and not subject to “Certificate of Competency” reviews. [§15.608, FAC 90-26, CSW Unit 16, Task 9].

Incorporating Evaluation Factors in RFPs

 RFPs must directly, expressly state whether:

Non-Price evaluation factors (taken as a whole) are ...

- } • Significantly more important than, **or**
- } • Approximately equal in importance to, **or**
- } • Significantly less important than ...

} Cost or price.

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Include this language in Section M (when using the UCF). [§15.605, FAC 90-31, Case 94-701, CSW Unit 16, Task 6]

✋ Numerical weights are NOT mandated (or encouraged) by the FAR. However, the FAR reaffirms that numerical weights can be used — and do not necessarily have to be disclosed in the RFP. Contracting officers may disclose numerical weights “on a case by case basis” in the solicitation. Although the new FAR language does not discourage this practice, disclosing weights generally is NOT good practice. The Comptroller General has repeatedly ruled that Source Selection Authorities have discretion to overrule numerical scores when weights are NOT disclosed in the solicitation. [§15.605, FAC 90-31, Case 94-701, CSW Unit 16, Tasks 7 and 8]

✋ Contracting officers must state **all significant** evaluation factors and subfactors in requests for proposals. [§15.406-5 and §15.605(d), FAC 90-31, Case 94-701, CSW Unit 16, Task 13]

Developing evaluation factors for Part 12 commercial item acquisitions

✂ As the starting point in drafting factors for a specific acquisition, FAR §12.602 recommends the following standard evaluation factors. [§12.602, FAC 90-32, Case 94-790, CSW Unit 16, Tasks 3 and 4]

- Technical capability (i.e., how well proposed products meet the Government requirement).
- Past performance.
- Price.

✂ ✋ In particular, the FAR 12.206 stresses reliance on past performance as an important factor in every Part 12 acquisition. [§12.206 & 12.602(b), FAC 90-32, Case 94-790, CSW Unit 16, Tasks 3 and 4]

✂ FAR Part 12 solicitations do not have to contain subfactors for technical capability when the solicitation adequately describes its intended use. Instead, technical evaluators can base their evaluations on such things as product literature, product samples (if requested), technical features and warranty provisions. In general, use as simple a set of evaluation factors as possible for commercial item acquisitions. [§12.602(b), FAC 90-32, Case 94-790, CSW Unit 16, Tasks 3 and 4]

Market Acceptance Criteria for Commercial Items

✂ When acquiring commercial items under FAR Part 12, agencies may — “under appropriate circumstances” — require offerors to demonstrate that offered items have either achieved commercial or Government market acceptance. Example of an “appropriate circumstance” — the agency’s minimum need is for an item that has a demonstrated reliability, performance or

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product support record in a specified environment. Example of an “inappropriate circumstance”: When new or evolving items may meet the agency’s needs.

In developing “commercial market acceptance” criteria for the solicitation, ensure that the criteria —

- Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need.
- Relate to an item’s performance and intended use, not an offeror’s capability.
- Are supported by market research.
- Include consideration of items supplied satisfactorily under recent or current Government contracts, for the same or similar items.
- Consider the entire relevant commercial market, including small business concerns (i.e. do not exclude the products of small businesses simply because those products do not enjoy the market share of products from large businesses).
[§11.103, FAC 90-32, Case 94-790, CSW Unit 16, Tasks 3 and 4]



You may NOT use “commercial market acceptance” as a sole criterion to evaluate whether an item meets the Government's requirements. [§11.103, FAC 90-32, Case 94-790, CSW Unit 16, Tasks 9-10]



If you incorporate “commercial market acceptance” criteria in the solicitation, document the file to:

- Describe the circumstances justifying the use of commercial market acceptance criteria, and
- Support the specific criteria being used. [§11.103, FAC 90-32, Case 94-790, CSW Unit 16, Tasks 3 and 4]

Soliciting Multiple Offers from Sellers of Commercial Items



When acquiring commercial items under FAR Part 12, generally authorize offerors to submit multiple offers. [§12.205(b), FAC 90-32, Case 94-790, CSW Unit 16, New Task]

In many commercial markets, sellers offer multiple products — which differ in characteristics as well as in price — under the same or different brand names to satisfy essentially the same requirement. In such markets, the Government can be the loser if it forbids firms from offering more than one item out of its product line — especially if a vendor fails to offer what Government evaluators would consider to be its strongest product. Therefore, encourage vendors in such commercial markets to offer the best products available from their differing product lines — even if that means reviewing multiple offers from the same vendor. This is especially important when evaluation is based on intended use rather than on predetermined subfactors.

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Incorporating evaluation factors and related proposal submission instructions in Part 12 commercial solicitations



A new provision, 52.212-2, *Evaluation - Commercial Items*, has been added to the FAR for commercial items.

- This provision is optional, for use when evaluation factors are appropriate (e.g., NOT for sealed bidding). When using a FAR Part 13 simplified acquisition procedure, see the procedures at FAR 13.106 as an alternative to this provision. [§12.301, FAC 90-32, Case 94-790, CSW Unit 16, Task 13]
- If this provision is not used, include a similar provision as an addendum to the evaluation factors required by FAR §14.2 or §15.6. [§12.301, FAC 90-32, Case 94-790, CSW Unit 16, Task 13]
- The provision calls for award on the basis of “best value” (i.e., to the responsible offeror whose offer will be the most advantageous to the Government, “price and other factors considered”). [§52.212-2, FAC 90-32, Case 94-790, CSW Unit 16, Task 13]
- If used, tailor paragraph (a) of the new provision to the specific acquisition, by describing the applicable evaluation factors and their relative importance. Also indicate the relative importance of all non-price factors, taken together, vis-à-vis price. Any change to this provision is NOT considered deviation. [§52.212-2, FAC 90-32, Case 94-790, CSW Unit 16, Task 13]
- Ensure the instructions provided in the provision at 52.212-1, *Instructions to Offerors - Commercial Items*, and the evaluation factors provided in the provision at 52.212-2, *Evaluation - Commercial Items*, are in agreement. [§52.212-1 and §52.212-2, FAC 90-32, Case 94-790, CSW Unit 16, Task 13]




When acquiring commercial items under FAR Part 12, do NOT require offerors to prepare and submit technical proposals when you can reasonably expect Government evaluators to apply evaluation factors on the basis of existing product literature and other information from market research. In particular, technical evaluators may be able to rely both on literature from the offerors and on published reports from independent sources which compare and contrast the features, quality, et. al. of commercially available products. [§12.205(a), FAC 90-32, Case 94-790, CSW Unit 16, New Task].


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Method of Procurement

Contract Specialist Workbook, Unit of Instruction 17

Reserving The Right To Award Without Discussions


 When award will be on the basis of competitive proposals, determine whether to incorporate the award clause at FAR 52.215-16 with or without Alternate II. Generally reserve the right to award without discussions by using Alternate II. The advantage of Alternate II: Initial proposals are likely to be more realistic. Use the clause without the Alternate when discussions are clearly inevitable (e.g., when the contemplated contract type is cost reimbursable). [§15.407 Solicitation provisions and §52.215-16 Contract Award, FAC 90-31, Case 94-701, CSW Unit 17, New Task]

 When acquiring commercial items, the standard method is award without discussions. However, this can be changed in an addendum to accommodate award through simplified acquisition procedures, sealed bidding, or award after discussions. [§52.212-1(g), FAC 90-32, Case 94-790, CSW Unit 17, Task 4]

Procurement Planning

Contract Specialist Workbook, Unit of Instruction 18

Controls On Contracting For Proposal Evaluation

 Except under one of the following conditions, agencies may NOT pay contractors for services related to conducting evaluations or analyzing any aspect of a proposal submitted for an initial contract award. [§37.203(d), FAC 90-33, Case 94-710, CSW Unit 18, Task 3]

- The agency head determines in writing that “covered personnel” are not readily available either in the requesting agency or from another agency with adequate training and capabilities to perform the required proposal evaluation; or
- The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDC’s contract meets the criteria of 35.017-3.

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☞ “Covered personnel” include:

- An officer or an individual who is appointed in the civil service by one of the following acting in an official capacity; (i) the President; (ii) a Member of Congress; (iii) a member of the uniformed services; (iv) an individual who is an employee under 5 U.S.C. Section 2105; (v) the head of a government-controlled corporation; or (vi) an adjutant general appointed by the Secretary concerned under 32 U.S.C. 709(c).
- A member of the Armed Services of the United States.
- A person assigned to a Federal agency who has been transferred to another position in the competitive service in another agency. [§37.201, FAC 90-33, Case 94-710, CSW Unit 18, Task 3]

☞ The FAR at §37.204 sets forth guidelines for determining the availability of “Covered personnel”. [§37.201, FAC 90-33, Case 94-710, CSW Unit 18, Task 3]

Establishing Indefinite Delivery & Task Order Contracts (New)

Contract Specialist Workbook (consolidation of Part B of Unit 4, and Task 3 of Unit 19.1, along with new material on task order contracts.)

Coverage of Task Order Contracts

☞ For the first time, FAR Part 16 explicitly covers task order contracting. The FAR defines a task order contract as “a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.” In contrast, the FAR defines a delivery order contract as a contract “for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.” [§16.501-1, FAC 90-33, Case 94-711]

☞ Delivery and task order contracts are indefinite delivery contracts, for use in conjunction either with requirements or indefinite-quantity terms and conditions. [§15.501, FAC 90-33, Case 94-711]

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Steps in Establishing Task Order Contracts

1. Determine whether to establish a task order contract.

- Alternative -- a separate procurement for each task.
- Key issue: When does it make sense to establish a task contract? There has been NO substantial change in FAR criteria for the use of requirements and indefinite-quantity contracts. However, these criteria are permissive (e.g., a “requirements contract may be appropriate ... when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services ...”). You do not have to award a task or delivery order contract under such circumstances. [§16.503(b) and §16.504(b), FAC 90-33, Case 94-711]

2. Prepare and review the draft SOW. The test in drafting such an SOW is whether it “reasonably describes the general scope, nature, complexity, and purpose of the supplies or services to be acquired under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer.” [§16.504((a)(4)(ii)] Also identify and include:

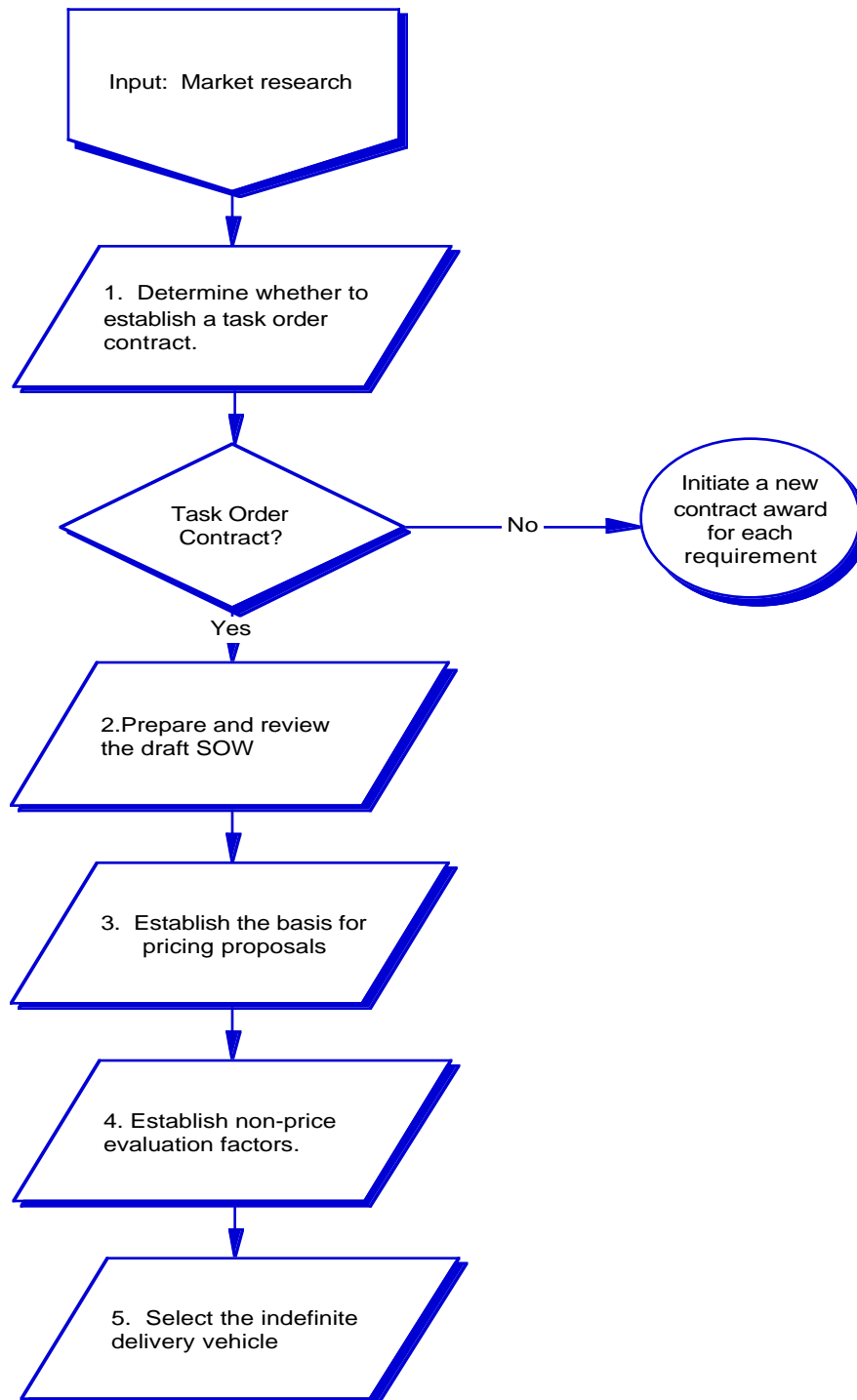
- The number of options and period for which the contract may be extended under each option. [§16.504((a)(4)(i)]
- Terms and conditions required or necessary regarding minimum or maximum limits on the contractor’s obligation to deliver and the Government’s obligation to order. [§16.503(a) and §16.504(a)]
- Terms and conditions required or necessary regarding maximum or minimum quantities that the Government may order under each individual order and the maximum that it may order during a specified period of time. [§16.503(a) and §16.504(a)]
- If the contract is for advisory and assistance services, the ordering period generally may NOT exceed five years (counting all options and modifications). [§16.505(c), FAC 90-33, Case 94-711]

3. Establish the basis for pricing proposals as part of the source selection for award of the overall contract. Among other alternatives, contracting officers might require offerors to propose:

- A fixed price for each type of task (e.g., \$20 for oil changes), OR
- Fixed rates for different types of labor, with the negotiation for each order to center on number of hours required by labor category, OR
- Maximum rates (i.e., ceilings) for each type of labor, but allow the awardee or awardees to propose lower rates when being considered for any individual order.

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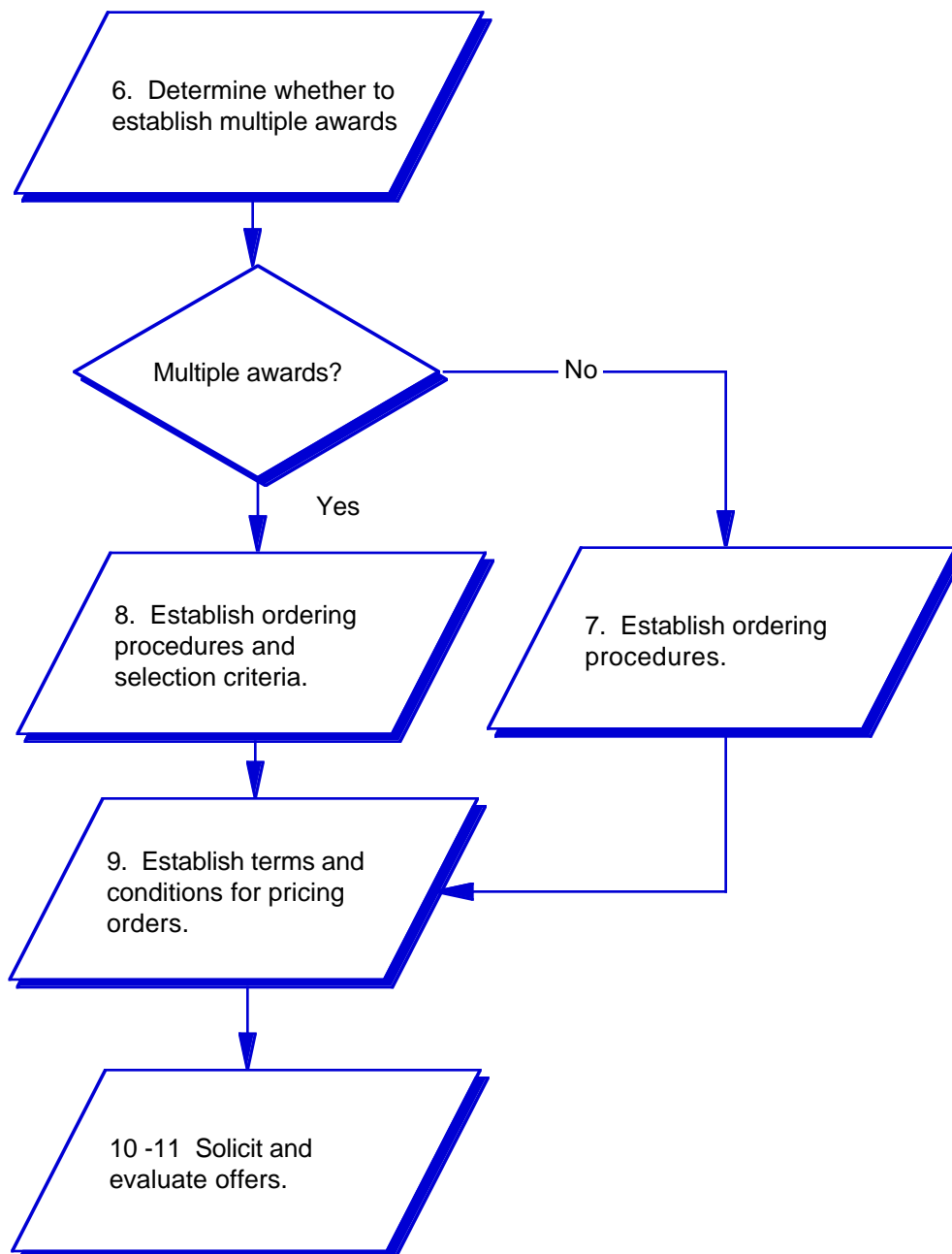
STEPS IN ESTABLISHING TASK ORDER CONTRACTS



(Flowchart continued on next page)

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(Flowchart continued from prior page)



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4. Establish non-price evaluation factors. In particular, consider factors related to —

- Past performance.
- Key personnel (qualifications, available time, and contractual language to ensure that the contractor uses personnel of equal or better qualifications for work under the contract).
- Performance of sample tasks.
- Management controls.

5. Select the indefinite delivery vehicle. The FAR encourages use of an indefinite quantity contract rather than a requirements contract. Indefinite quantity, multiple award task order contracts tend to guarantee each awardee a stipulated minimum amount of work. [§16.501 and §16.505(b)(2)(iv), FAC 90-33, Case 94-711]

6. Determine whether to establish multiple awards.

- The FAR establishes a general preference for multiple awards when using indefinite-quantity contracts. However, the FAR identifies the following reasons for awarding to only one vendor. [§16.504(c)(1), FAC 90-33, Case 94-711]
 - ◊ Only one contractor is capable of providing performance at the level of quality required because the deliverable is unique or highly specialized.
 - ◊ Market research indicates that the Government will get more favorable terms and conditions, including pricing, if a single award is made.
 - ◊ The cost of administration of multiple contracts would probably outweigh any potential benefits.
 - ◊ Likely tasks are so integrally related that only a single contractor can reasonably perform the work.
 - ◊ The contracting officer determines that multiple awards would not be in the best interests of the Government.
- You must make multiple awards if a contract for advisory and assistance services would exceed 3 years and \$10,000,000 (including options). [§§16.503(d) and 16.504(c)(2), FAC 90-33, Case 94-711.] There are only three exceptions to this requirement.
 - ◊ Prior to soliciting, the contracting officer (or other designated official) determines in writing that the services required under the task order contract are so unique or highly specialized that it is not practicable to award more than one contract (e.g., because likely tasks are so integrally related that only a single contractor can reasonably perform the work).
 - ◊ After evaluating offers, the contracting officer (or other designated official) determines in writing that only one offeror is capable of providing the services required at the level of quality required.
 - ◊ Only one offer is received.

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7. If the decision is single award, establish ordering procedures.

Key issue -- on task order contracts, should the contracting officer delegate authority to place orders to CORs or other ordering officials? This may be possible when the task order contract establishes a fixed price for each task (e.g., \$2,000 + travel to conduct each session of "Cost Analysis"). Delegating such authority may NOT be advisable if the task order contract only establishes labor rates and provides for negotiating material costs and labor hours order by order.

8. If you decide to make multiple awards, incorporate ordering procedures in the solicitation. Also incorporate the selection criteria that will be used in fairly considering every awardee for each order in excess of \$2,500. [§6.001(f), §16.504(a)(4) and §16.505(b), FAC 90-33, Case 94-711]. When drafting such procedures:

- Avoid methods (such as allocation) that would not result in fair consideration being given to all awardees prior to placing each order. However, particularly with respect to an indefinite-quantity contract, it may be necessary to place an order with each awardee to "satisfy a minimum guarantee" (see §16.505(b)(2)(iv)).
- You may allow the use of oral proposals and streamlined ordering procedures.
- The ordering procedures need NOT comply with the competition requirements of Part 6. The Government does NOT have to prepare formal evaluation plans for placing an individual order. The Government does NOT have to score or rank quotes and offers from awardees when considering them for an order.
- Contracting officers have broad discretion regarding the factors that are relevant to the placement of orders.
- The contract's ordering procedure may expressly authorize the Government to NOT contact every awardee prior to placing an order. This may be appropriate when:
 - ◊ The contracting officer has sufficient information to fairly consider every awardee for the order based on the selection criteria stated in the contract, OR
 - ◊ The contracting officer determines that there is an applicable exception under §16.505(b)(2) to the "fair consideration" requirement.

For example, the contract's stated ordering procedures may allow the use of past performance information from previous task orders as a screen in selecting awardees for informal solicitations of offers on an upcoming order.

9. Establish the terms and conditions for pricing individual task orders. You may provide for any appropriate cost or pricing arrangement. [§16.501-2(c), FAC 90-33, Case 94-711]

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10. Solicit offers.

- Insert the provision at §52.216-27, Single or Multiple Awards, in solicitations for indefinite quantity contracts that may result in multiple contract awards. Do NOT use this provision, however, in solicitations for advisory and assistance services contracts that exceed three years and \$10,000,000 (including all options).
- Insert the provision at 52.216-28, Multiple Awards for Advisory and Assistance Services, in solicitations for task order contracts for advisory and assistance services that exceed three years and \$10,000,000 (including all options) unless a determination has been made under 16.504(c)(2)(i)(A).
- You may modify these provisions to specify the number of awards the Government reasonably estimates that it may make.

11. Evaluate offers.

Contract Types — Pricing Arrangements

Contract Specialist Workbook, Unit of Instruction 19.1

Changes In Requirements For D&Fs

✋ D&Fs are no longer required for cost reimbursable contracts or fixed price incentive contracts. Sections 1021 and 1071 of the Streamlining Act repealed the requirement for Secretarial/Agency Head determinations regarding use of cost type or incentive contracts. Therefore, that requirement has been removed from FAR §16.301-3, §16.403, §16.403-1, and §16.403-2. [FAC 90-24, CSW Unit 19.1, Task 7]

✋ The FAR now permits contracting officers to sign determinations and findings still required to establish the basis for application of the statutory price or fee limitation in cost-plus-fixed-fee contracts. Previously, the FAR delegated this authority to the “agency head or designee.” [§16.306, FAC 90-30, Case 94-700 CSW Unit 19.1, Task 7]

Types Of Contracts For Use In Acquiring Commercial Items

✂ When contracting for commercial items under FAR Part 12, only award firm fixed price contracts and fixed price contracts with economic price adjustment. Of course, this does not rule out any of the indefinite delivery types of contracts. [§12.207, 16.201, 16.202-1, and 16.301-3, FAC 90-32, Case 94-790, CSW Unit 19.1, Task 2]

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Contract Financing

Contract Specialist Workbook, Unit of Instruction 21

Eligibility for Non-Commercial Contract Financing

☞ Unless otherwise authorized by agency regulation, contract financing may be provided only in contracts for non-commercial items with: [§32.104, FAC 90-33, Case 94-764, CSW Unit 21, Task 1]

- Small business contractors, when the contract price will be greater than the simplified acquisition threshold.
- Other than small business contractors, when the contract price will be \$1 million or more, or for a group of contracts, whose prices are greater than the simplified acquisition threshold, that total \$1 million or more.

New Subpart 32.10, Performance-Based Payments

☞ Performance-based payments are contract financing payments that are not payment for accepted items. Instead, the financing payments are based on:

- Performance measured by objective, quantifiable methods,
- Accomplishment of defined events, or
- Other quantifiable measures of results. [§32.10, FAC 90-33, Case 94-764, CSW Unit 21, Task A3]

☞ Performance-based payments under §32.10 may be provided only if: [§32.1000 and §32.1003, FAC 90-33, Case 94-764, CSW Unit 21, Task A3]

- The contract is excepted from full and open competition under FAR Part 6 and awarded non-competitively under FAR Part 15.
- The contract is NOT for architect-engineer services or construction, or for ship-building or ship conversion, alteration, or repair (with progress payments based upon a percentage or stage of completion).
- The contract does not provide for other methods of contract financing.
- The contract is a definitized fixed-price type contract.
- The contracting officer and offeror are able to agree on the performance-based payment terms.

FUNCTION BY FUNCTION CHANGES

✎ Key issues: [§32.1004, FAC 90-33, Case 94-764, CSW Unit 21, new task]

- Establishing performance bases.
- Establishing performance-based finance payment amounts.
- Adjusting the terms as necessary to reflect contract modifications.
- Liquidation terms and conditions.

New Subpart 32.2, Commercial Item Purchase Financing

✂ This subpart contains the policy and guidance applicable to contract financing of commercial purchases. It is wholly new. [§32.2, FAC 90-33, Case 94-764, CSW Unit 21, New Part]

The pre-FASA FAR discouraged the use of Government contract financing for sellers of commercial items (see the pre-FASA FAR 32.502-1(c)). When such financing was provided, the mostly common form was “Progress Payments Based on Cost”. The post-FASA FAR recognizes that buyer financing may be a customary market practice for some commercial items. Hence, subpart 32.2 provides contracting officers with new financing choices while precluding use of such Government unique financing as progress payments based on costs (absent advance approval as provided in agency FAR Supplements). [§12.210 and §32.2, FAC 90-32, Case 94-970, CSW Unit 21, New Part]

✂ *Types of Commercial Item Buyer Financing*

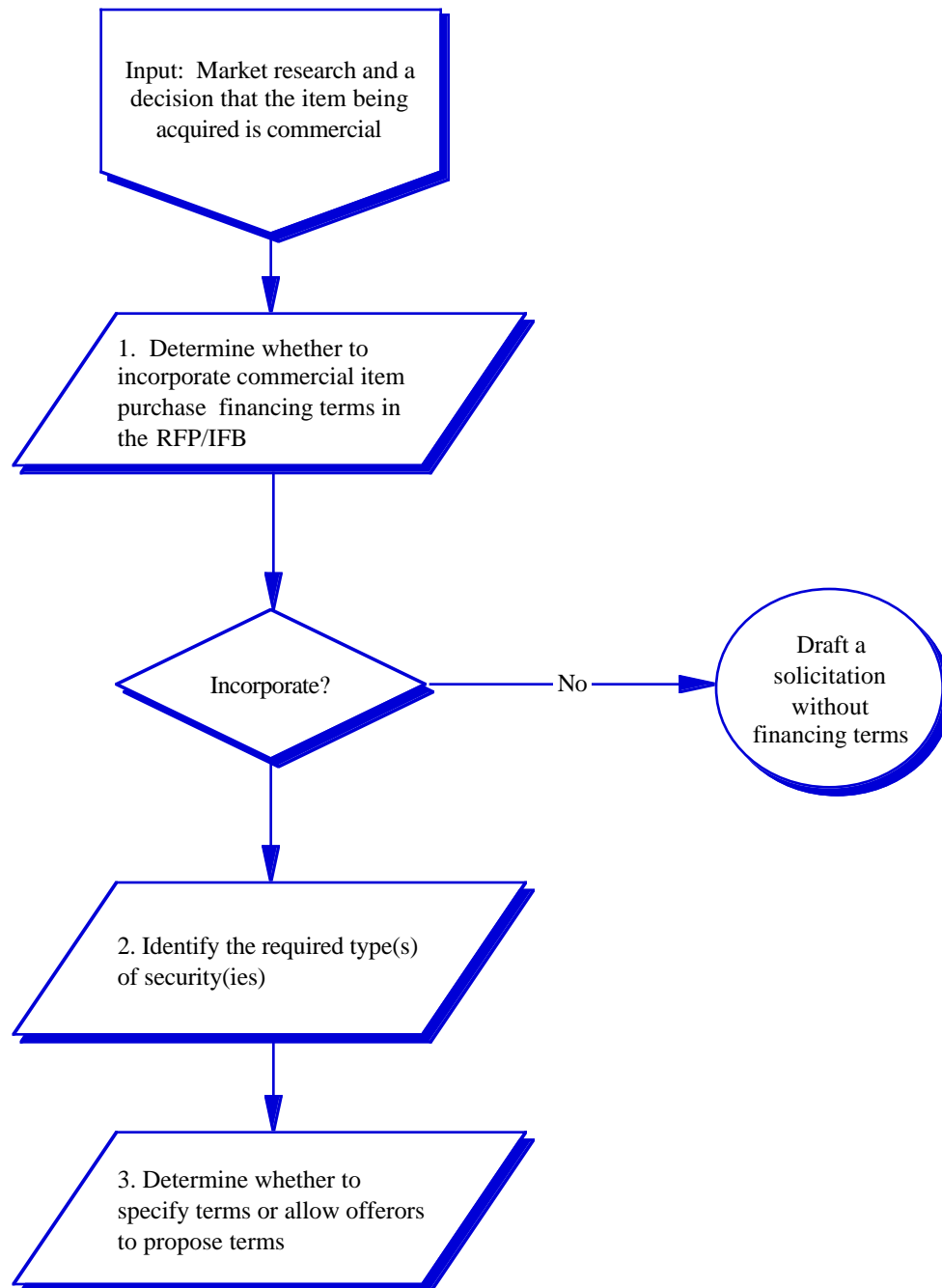
Two basic types of financing are available when contracting for commercial items: [§32.202-2, FAC 90-33, Case 94-764, CSW Unit 21, New Part]

- 1) *Commercial advance payments* — Payments made before any performance of work under the contract. Commercial advance payments may NOT total more than 15 percent of the contract price.
- 2) *Commercial interim payments* — Payments made after the contractor has begun work under the contract but prior to acceptance (payments for accepted deliverables are *delivery payments*). For example, if the contractor has assigned parts or components from inventory for use in performing the contract, work has commenced and the 15% limit no longer applies.

Note that commercial advance and interim payments are NOT subject to the interest penalty provisions of the Prompt Payment Act. Instead, the FAR requires agencies to establish payment times for such financing payments (e.g., 30 days for commercial advance payments and 14 days for interim payments).

FUNCTION BY FUNCTION CHANGES

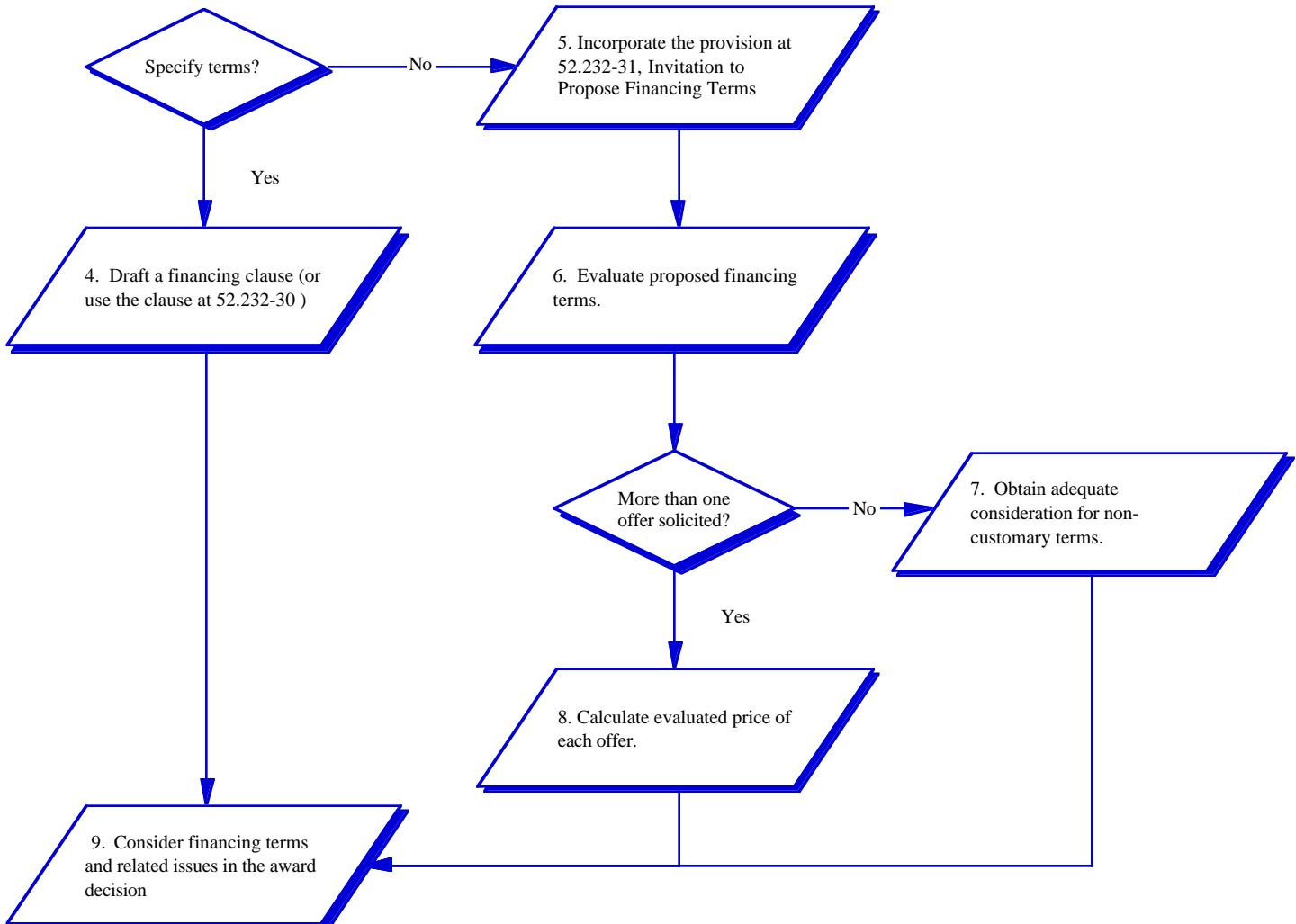
Commercial Item Purchase Financing



(Flowchart continued on next page)

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(Flowchart continued from prior page)



FUNCTION BY FUNCTION CHANGES

Steps in Establishing Terms for Commercial Item Buyer Financing

1. **Determine whether to incorporate commercial item purchase financing terms in the solicitation.** Financing is normally the seller's responsibility. However, in some markets, buyer financing is a customary commercial practice. Hence, a contracting officer may agree to finance sellers of commercial items — if, and only if — all of the following are true.
 - The contract item financed is a commercial supply or service.
 - The contract price exceeds the simplified acquisition threshold at Part 13.
 - The contracting officer determines that it is appropriate or customary in the commercial marketplace for buyers to finance sellers of the item.
 - Authorizing this form of contract financing is in the best interest of the Government. Agency FAR Supplements are likely to establish standards for determining when financing meets the test of Governmental best interest. [§32.202-1(a) and (e), FAC 90-33, Case 94-764]

2. **Identify the type(s) of security that offerors must provide.** Commercial financing payments can be made ONLY IF the contractor offers adequate security. The solicitation must state the types of security that the Government will accept. If you are willing to accept more than one form of security, require the offeror to specify the form of security it will provide. Alternatives include:
 - The offeror's financial condition, if:
 - ◊ That would, in the opinion of the contracting officer, constitute adequate security, and
 - ◊ The offeror agrees to provide additional security should that financial condition become inadequate as security.
 - Paramount lien on specified assets (e.g., work in process, the contractor's plant, or the contractor's inventory), conditioned upon contractor certification that the assets subject to the lien are free from any prior encumbrances. The contract must also authorize the Government to verify the existence and value of the assets.
 - Irrevocable letters of credit from a federally insured financial institution.
 - A bond from a surety acceptable in accordance with Part 28 (note that the bond must guarantee repayment of the unliquidated contract financing).
 - A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor.
 - Title to identified contractor assets of adequate worth.
 - Other assets described in FAR §28.203-2, §28.203-3, and §28.204.

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3. Determine whether to specify terms or allow contractors to propose terms.

- Offeror proposed financing terms. [§32.205]
 - ◊ If you select this alternative, each offeror may propose financing terms that differ from those proposed by other offerors.
 - ◊ Use proposed financing terms as a factor in evaluating proposed prices.
 - ◊ The awardee's financing terms become part of the contract.
- Contracting officer specified terms. [§32.204]
 - ◊ Specify financing terms in the solicitation — either by drafting a clause as prescribed at §32.206(b) or by incorporating the clause at §52.232-30, *Installment Payments for Commercial Items*.
 - ◊ When the solicitation specifies financing terms, you may NOT use contract financing as a factor in evaluating proposed prices — even if one of the offerors proposes to do the work without Government financing. On the other hand, you cannot reject such a proposal as being nonresponsive.
 - ◊ Specified financing terms become part of the contract, unless the proposal is not predicated on any financing.

4. Draft a financing clause. Unless using the clause at 52.232-30, the incorporated clause must:

- Describe the computation of the financing payment amounts.
- Describe specific conditions of contractor entitlement to those financing payments.
- Describe how financing payments will be liquidated by delivery payments.
- Describe the security provided by the contractor for the financing payments.
- Describe the frequency, form, and any additional content of the contractor's request for financing payments (in addition to the requirements of the clause at 52.232-29, *Terms for Financing of Purchases of Commercial Items*).
- Include the unaltered text of the FAR clause at §52.232-29, *Terms for Financing of Purchases of Commercial Items*.

FUNCTION BY FUNCTION CHANGES

5. **To solicit financing terms from offerors, incorporate the provision at 52.232-31, Invitation to Propose Financing Terms.** Also specify the: [§32.205]
 - The delivery payment (invoice) dates that will be used to evaluate financing proposals. [§32.205]
 - The interest rate to be used for evaluating the proposed financing terms — namely, the Nominal Discount Rate specified in Appendix C of OMB Circular A-94 appropriate for the period of contract financing. [§32.205]

6. **Evaluate proposed financing terms.**
 - Determine whether the proposed financing complies with FAR Part 32 and agency FAR Supplements (e.g., the limit of 15% on commercial advance payments). Any contract financing arrangement not in accord with the requirements of agency regulations or Part 32 is unusual contract financing and requires advance approval in accordance with agency procedures.
 - Identify front-loaded financing terms. Exceptionally high amounts of financing early in the contract may unduly increase the risk to the Government. Analyze the security and the amounts and timing of financing payments as a whole to determine whether the arrangement will be in the best interest of the Government.
 - Determine the acceptability of the proposed liquidation method (including any necessary concurrences, if required, from the cognizant payment office).
 - Ensure the proposed terms are complete and in compliance with the requirements of FAR §32.206.
 - Identify any other reason for questioning whether proposed financing terms are in the Government's best interests.

7. **If only one offer is solicited, obtain adequate consideration for noncustomary terms.** Consideration for financing is required only if the proposed financing is expected to be substantially more advantageous to the offeror than the offeror's normal method of customer financing. Base your prenegotiation position on the time value of the additional financing to be provided.

8. **When offerors propose financing terms in competitive acquisitions, calculate the evaluated price of each offer.** Determine the evaluated price for each offeror by (a) computing the imputed cost of the financing payments and (b) adding the imputed cost to the proposed price. The imputed cost of a single financing payment is the amount of the payment multiplied by the annual interest rate, multiplied by the number of years or fraction thereof between the date of the financing payment and the date the amount would have been paid as a delivery payment. The imputed cost of financing is the sum of the imputed costs of the individual financing payments.

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For the interest rate in these calculations, use the Nominal Discount Rate specified in Appendix C of OMB Circular A-94, “Benefit-Cost Analysis of Federal Programs; Guidelines and Discounts”, appropriate to the period of contract financing. Where the period of proposed financing does not match the periods in the OMB Circular, the interest rate for the period closest to the finance period shall be used. Appendix C is updated yearly, and is available from the Office of Economic Policy in the Office of Management and Budget (OMB).

9. Consider financing terms and related issues in the award decision.

- Determine whether the proposed securities are adequate. The value of the security must at least equal the maximum unliquidated amount of the contract financing payments.
- Determine whether the proposed financing terms (if offeror specified) are in the best interest of the Government.

Use Of Government Property And Supply Sources

Contract Specialist Workbook, Unit of Instruction 22

Use Of Government Sources Of Supply By Javits-Wagner-O'Day Contractors

☞ Nonprofit agencies for the blind or severely disabled may use Government supply sources in performing contracts under the Javits-Wagner-O'Day Act, if:


- The nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and
- The supplies or services received are directly used in making or providing a commodity or service approved by the Committee for Purchase From People Who Are Blind or Severely Disabled to the Federal Government. [§51.101 and §51.102, FAC 90-31, Case 94-701, CSW Unit 22, Task B2]

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Solicitation Preparation

Contract Specialist Workbook, Unit of Instruction 24

Electronic Contracting

 Contracting officers can solicit bids and proposals electronically and permit contractors to submit bids and proposals electronically. When preparing a solicitation authorizing electronic offers, specify the electronic commerce method(s) that bidders may use. Also consider the impact of electronic data interchange on the time reasonably needed by offerors to prepare and submit offers — electronic commerce should speed up the process of preparing and submitting offers. [§14.202-1, 14.202-2, 14.202-8, and 14.203-1; FAC 90-29, Case 91-104, CSW Unit 24, Tasks A1, A3, B2, B4, and B4.1]


Solicitations for Commercial Items


 The Streamlining Act states that, to the maximum extent practicable, contracts for commercial items shall contain only those terms and conditions that are:

- Necessary to implement statutes and executive orders, and
- Consistent with “standard commercial practice.”

Hence, the FAR Part 12 requires only two provisions and two clauses in solicitations for commercial items. Notwithstanding the provision and clause prescriptions in any other part of the FAR, NO other provisions and clauses are required in such solicitations. The provisions and clauses are as follows.


- 52.212-1, Instructions to Offerors - Commercial.
- 52.212-3, Offeror Representations and Certifications - Commercial Items.
- 52.212-4, Contract Terms and Conditions - Commercial Items.
- 52.212-5, Contract Terms and Conditions Required To Implement Statutes Or Executive Orders - Commercial Items. [§12.301, FAC 90-32, Case 94-790, CSW Unit 24, New Tasks]

 In their FAR supplements, agencies may require use of other provisions and clauses only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the Senior Procurement Executive or representative on the FAR Council. [§12.301(f), FAC 90-32, Case 94-790, CSW Unit 24, New Tasks]


 Based on market research, contracting officers may tailor the provision at 52.212-1 and the clause at 52.212-4 to incorporate customary terms and conditions of the commercial market

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for the requirement. The FAR encourages tailoring especially if the commercial terms and conditions would be appropriate in concluding a business arrangement, satisfactory to both parties, and not otherwise precluded by law or executive order. However, contracting officers may NOT tailor terms and conditions of 52.212-4 that implement statutory requirements (e.g., assignments, disputes, payment, invoices, other compliances, and compliance with laws unique to Government contracts).


 Contracting officers may, at their discretion, incorporate other provisions and clauses — provided the additional provisions and clauses are consistent with customary commercial practice. For example, contracting officers may include provisions or clauses related to the use of:


- Indefinite delivery contracts (FAR §16.505).
- Options (§17.208).
- Recovered materials (Part 23). (§12.301(d), FAC 90-32, Case 94-790)

 There is a new combined CBD synopsis/solicitation for commercial items. This format is optional when:

- Acquiring commercial items, and
- The combined synopsis/solicitation would not exceed 12,000 textual characters (i.e., the solicitation is relatively simple and no lengthy addenda are necessary).

Use SF 1449 for all other solicitations of commercial items. [§12.204 and 12.603, FAC 90-32, Case 94-790, CSW Unit 24, New Tasks]

 When acquiring commercial items, establish solicitation response times which afford potential offerors a reasonable opportunity to respond, considering such factors as the requirement's complexity, commercial response times, availability, and urgency. The minimum is 15 days from issuance of the solicitation. If using the combined synopsis/solicitation, the solicitation is considered “issued” on the date of the CBD publication — saving another 15 days. [§5.203, 12.205(c) and 12.603(c)(3), FAC 90-32, Case 94-790, CSW Unit 24, New Tasks]


 Appendix I is the new Unit of Instruction for the Contract Specialist Workbook. It provides more details on preparing solicitations for commercial items.


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Publicizing Proposed Procurements


Contract Specialist Workbook, Unit of Instruction 25


New Exceptions To Synopsizing

 There is an exception to synopsizing requirements when the contract action is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute. [§5.202 and §5.301, FAC 90-31, Case 94-701, CSW Unit 24, Task 1] *See also* “Competition Requirements.”


 No synopsis will be required for actions up to \$250,000 made through a certified FACNET after Governmentwide FACNET has been certified. Until then, no synopsis is required for any action over \$25,000 through the Simplified Acquisition Threshold which is made through a certified FACNET. [§5.202, FAC 90-29, Case 94-770, CSW Unit 24, Task 1]

Electronic Distribution Of Solicitations

 If a small business concern requests a copy of an electronically disseminated solicitation, you may e-mail the copies to the concern’s electronic address. [§5.102, FAC 90-29, Case 91-104, CSW Unit 24, Task 5)

 When solicitations are made available through electronic data interchange, the CBD synopsis must provide the information necessary to obtain the solicitation (e.g., electronic address and downloading instructions) and respond to it. [§5.207, FAC 90-29, Case 91-104, CSW Unit 24, Task 3].


Synopsizing Contracts For Non-Commercial Items

 If you have determined that the requirement is for other than a commercial item, CBD synopses (if any) must inform prospective offerors that the Government does NOT intend to use Part 12 for the acquisition. [§10.001(d), FAC 90-32, Case 94-790, CSW Unit 24, Task 3]

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Amending Solicitations

Contract Specialist Workbook, Unit of Instruction 28

 Contracting officers may use electronic data interchange to notify prospective offerors of any change to the closing date for submitting proposals. [§15.410, FAC 90-29, Case 91-104, CSW Unit 28, Task 4]


Canceling Solicitations


Contract Specialist Workbook, Unit of Instruction 29


 When canceling an IFB before opening, do not let anyone view electronic bids. Purge each bid and all related data received from the bidder from all data storage systems — both primary and backup. [§14.209; FAC 90-29, Case 91-104, CSW Unit 29, Task 4]


Processing Bids

Contract Specialist Workbook, Unit of Instruction 30

 Keep electronic bids in a “secured, restricted-access electronic bid box” prior to opening. [§14.401; FAC 90-29, Case 91-104, CSW Unit 30, Task 1]

 If you have reason to believe that electronic bids from “an important segment of bidders” were lost because of problems with the Government’s telecommunications equipment or servers (e.g., power outages or software bugs), consider postponing bid opening so that bidders can electronically resubmit their bids. [§14.402-3; FAC 90-29, Case 91-104, CSW Unit 30, Task 5]


 IFBs may allow bidders to modify or withdraw bids by electronic messaging. If a bidder withdraws an electronic bid, purge the bid and all related data from all data storage systems — both primary and backup. [§14.303; FAC 90-29, Case 91-104, CSW Unit 30, Task 3]

 When conducting a cost comparison, the cost estimate for Government performance can be provided either in a sealed dated envelope or an electronic equivalent. [§7.304, FAC 90-29, Case 91-104, CSW Unit 30, Task 7]

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Late Offers


Contract Specialist Workbook, Unit of Instruction 32

 If submitted by an electronic commerce method authorized by the solicitation, do not consider an offer to be late if the Government received the offer “not later than 5:00 p.m. one working day prior to the date specified for receipt of” bids or proposals. [§14.304-1, 52.214-7, 52.214-23, 52.214-32, 52.214-33, 52.215-10, and 52.215-36; FAC 90-29, Case 91-104, CSW Unit 32, Task 2]

Bid Prices


Contract Specialist Workbook, Unit of Instruction 33


Labor Surplus Area As The Tie-Breaker

 The first tie breaker remains “Small business concerns that are also labor surplus area concerns”. However, when the tie bids are both from “other than small business concerns”, the advantage NO longer goes to the labor surplus area concern. Coverage of the role of labor surplus concerns as a factor in tie breaking can be found in §14.407-6, §19.202-3, §19.304, and §19.504. [FAC 90-32, Case 94-780, CSW Unit 33, Task 8]

Responsiveness

Contract Specialist Workbook, Unit of Instruction 34


 For an electronic bid to be responsive, the bidder must use the electronic commerce method specifically stipulated or permitted by the IFB. [§14.301 and 52.214-5; FAC 90-29, Case 91-104, CSW Unit 34, Task 1]


 Reject “unreadable” electronic bids unless the bidder provides clear and convincing evidence:

- Of the content of the bid as originally submitted; and
- That bid is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling. [§14.406; FAC 90-29, Case 91-104, CSW Unit 34, Task 1]

An electronic bid is unreadable if you cannot determine whether the bid is responsive (i.e., whether it conforms to the essential requirements of the IFB).

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 To be responsive, bids must offer a delivery date no later than that required by the IFB. If the contractor offers a delivery date that is “X days following my receipt of the contract or notice of award”, contracting officers compare that offered date to the required date. For this purpose, the FAR has long instructed contracting officers to add 5 days to the date of contract award to account for time required by the Post Office to deliver notice of award through the ordinary mail. Now, the FAR instructs contracting officers to add only one day if notice of award is transmitted electronically. [§12.103, §52.212-1, §52.212-2, FAC 90-29, Case 91-104, CSW Unit 34, Task 1]

 “Under appropriate circumstances”, agencies may require bidders to demonstrate that offered items have either achieved commercial or Government market acceptance. If such a requirement is in a Part 12/14 solicitation for bids, contracting officers (with technical support as necessary) must review the furnished information to determine whether or not in fact the item has met or exceeded the specified level of commercial or Government market acceptance. However, you may NOT reject the bid as nonresponsive simply because the offered item fails the market acceptance test. Rather, use market acceptance criteria only as one of the measures of whether the offered item is acceptable from the standpoint of product reliability, performance or product support. [§11.103, FAC 90-32, Case 94-790, CSW Unit 34, Task 1]

Processing Proposals


Contract Specialist Workbook, Unit of Instruction 35

 Reject offers submitted by electronic commerce unless the offeror used an electronic commerce method specifically stipulated or permitted by the solicitation. [§52.215-9; FAC 90-29, Case 91-104, CSW Unit 35, Task 6]


 If an electronic proposal is “unreadable”, immediately notify the offeror and provide the offeror with an opportunity to submit clear and convincing evidence:

- Of the content of the proposal as originally submitted; and
- That the proposal is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling.

An electronic proposal is unreadable if you cannot determine whether it conforms to the essential requirements of the solicitation. [§15.607; FAC 90-29, Case 91-104, CSW Unit 35, Task 6]

 When conducting a cost comparison, the cost estimate for Government performance can be provided either in a sealed dated envelope or an electronic equivalent. [§7.304, FAC 90-29, Case 91-104, CSW Unit 35, Task 3]


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 If an offeror withdraws an electronically transmitted proposal, purge the proposal and all related data from all data storage systems — both primary and backup. [§15.412; FAC 90-29, Case 91-104, CSW Unit 35, Task 4]

Applying Past Performance, Technical, And Other Non-Price Factors


Contract Specialist Workbook, Unit of Instruction 36


Evaluating Past Performance

 Contracting officers may obtain information on the past performance of an offeror from sources other than the offeror. This includes any source (public or private sector) known to the Government. In particular, obtain information from Government contracting activities that have evaluated an offeror's performance as prescribed in FAR Part 42.15. [§15.608, FAC 90-26, CSW Unit 36, New Task]

 When evaluating past performance information, consider such issues as:

- The number and severity of an offeror's problems,
 - Effectiveness of corrective actions taken by the offeror,
 - The offeror's overall work record.
 - Age and relevance of past performance information.
- [§15.608, FAC 90-26, CSW Unit 36, Tasks 2 and 3]

 Assign a neutral evaluation for past performance to any offeror which lacks relevant past performance history. [§15.608, FAC 90-26, CSW Unit 36, Tasks 2 and 3]

 “Under appropriate circumstances”, agencies may require offerors to demonstrate that offered items have either achieved commercial or Government market acceptance. If such a requirement is in a Part 12/15 solicitation, contracting officers (with technical support as necessary) must review the furnished information to determine whether or not in fact the item has met or exceeded the specified level of commercial or Government market acceptance. However, you may NOT conclude the proposal is technically unacceptable simply because the proposal fails to satisfy the criteria for market acceptance. Rather, the market test criteria may be used only as one of the measures of whether the offered item is acceptable from the standpoint of product reliability, performance or product support. [§11.103, FAC 90-32, Case 94-790, CSW Unit 36, Task 3]

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Price Analysis

Contract Specialist Workbook, Units of Instruction 34 and 37

\$ The FAR recognizes an additional base for price analysis — “Prices for the same or similar items obtained through market research.” [§15.805-2, FAC 90-32, Case 94-721, CSW Unit 33, Task 3 and Unit 37, Task 4]

\$ If cost or pricing data are not required, “the contracting officer shall make a price analysis to determine the reasonableness of the price and any need for further negotiation”. [§15.804-5(a)(1) , FAC 90-32, Case 94-721, CSW Unit 37]

Pricing Information From Offerors

Contract Specialist Workbook, Unit of Instruction 38 (formerly “Cost or Pricing Data”)

The New Threshold for Cost or Pricing Data

\$ The threshold for obtaining cost or pricing data is \$500,000 for all agencies. This amount will be subject to adjustment at five year intervals (with the first interval beginning on October 1, 1995). The new threshold applies only to prospective contract actions and does NOT affect the Government's rights regarding previously certified actions. [§15.804-2, FAC 90-22, CSW Unit 38, Task 1]

\$ If requested by the prime contractor, contracting officers shall modify contracts to change the threshold in the contract to the cost or pricing data threshold in 15.804-2(a)(1) — without requiring consideration. Prime contractors can then likewise modify their subcontracts. [FAC 90-22, CSW Unit 38, Task 1.1]

The New Order of Priority for Pricing Information

\$ Cost or pricing data are now the data of LAST resort in cost and price analysis. The FAR prohibits contracting officers from obtaining cost or pricing data if an exception applies. Even if an exception does not apply, the FAR strongly encourages a waiver if price reasonableness can be determined without resorting to cost or pricing data.

FUNCTION BY FUNCTION CHANGES

Why? Because reliance on cost or pricing data when such data are not necessary:

- Increases proposal preparation costs
- Generally extends acquisition lead-times, and
- Wastes both contractor and Government resources.
[§15.804-1, FAC 90-32, Case 94-721, CSW Unit 36, Standard]

\$ Hence, the FAR establishes a new order of priority for information to determine price reasonableness. To the extent permitted by FAR §15.804-2 (requirements for cost or pricing data) and §15.804-5(b) (requirements for information other than cost or pricing data to support commercial item exceptions), generally use this order of priority in determining the type of information required:

1. No further information **from the offeror** if the price is based on adequate price competition “except as provided by 15.804-5(a)(3)”.

§15.804-5(a)(3) authorizes contracting officers to request cost realism data from offerors. §15.804-5(a)(3) also authorizes requests for additional information from offerors necessary to determine price reasonableness after seeking the necessary information from sources other than the offeror “to the maximum extent practicable”.
2. Price-related information from sources other than offerors (relying first on information available within the Government and second on information obtained from sources other than the offeror).
3. Price-related information from the offeror.
4. Cost information from the offeror which does not meet the definition of cost or pricing data at FAR §15.801.
5. Cost or pricing data. However, if the expected price exceeds the dollar threshold for requiring such data and no exception applies and a waiver is not granted, then you must obtain cost or pricing data.
[§15.802, FAC 90-32, Case 94-721, CSW Unit 38, Standard]

New Standards for the “Adequate Price Competition” Exception

\$ The FAR expressly incorporates the principle established by the Comptroller General that price competition can be deemed adequate even when award is based on “greatest value”, as long as price is a “substantial factor”. What is substantial? A matter of judgment. The question is whether price was enough of a factor to cause offerors to “sharpen their pencils” in pricing their unique approach to the work. [§15.804-1(b)(1), FAC 90-32, Case 94-721, CSW Unit 38, Task 4]

FUNCTION BY FUNCTION CHANGES

\$ There is no longer an automatic presumption of inadequacy if “the solicitation was made under conditions that unreasonably denied to one or more known and qualified offerors an opportunity to compete”. Likewise, there is no longer an automatic presumption of inadequacy if “the low offeror has such a decided advantage that it is practically immune from competition”. These may be among the reasons for questioning the price of the otherwise successful offeror. But they are no longer reasons, in and of themselves, for requiring certified cost or pricing data. [§15.804-1(b)(1), FAC 90-32, Case 94-721, CSW Unit 38, Task 4]

\$ When only one offer is received contrary to expectations and price reasonableness cannot be determined by reference to a prior competition, contracting officers are now authorized to determine that the price competition was adequate if they can reasonably conclude that:

- The offeror believed that at least one other offeror was capable of submitting a meaningful, responsive offer.
- The offeror had no reason to believe that other potential offerors did not intend to submit an offer.

If, in such circumstances, the contracting officer determines that the proposed price is based on adequate price competition and is reasonable, that determination must be approved at a level above the contracting officer. [§15.804-1(b)(1), FAC 90-32, Case 94-721, CSW Unit 38, Task 4]

New Standards for the Catalog and Market Price Exceptions

[§15.804-1(a)(1)(ii), §15.804-1(b)(2), §15.804-6, 15.804-8, and §52.215-41, FAC 90-32, Case 94-721, CSW Unit 38, Task 3]

\$ The FAR eliminates:

- The Standard Form (SF) 1412, "Request for Exemption from Submission of Cost or Pricing Data."
- Relational formula (i.e., the ABC test) as a basis for determining whether there have been sufficient sales to the general public at the catalog price to warrant an exception.
- Requirements for offerors to account for "government end use" when addressing sales to the general public.

FUNCTION BY FUNCTION CHANGES

\$ Instead of a formula, the FAR establishes the following as standards for “sales in substantial quantities to the general public”:

- Substantial quantities means sales of more than a nominal quantity **based on the norm of the industry segment, considering such factors as the size of the market and how recently the item was introduced into the market.**
- Services must continue to meet the additional test of being “customarily provided by the offeror, using personnel regularly employed and equipment (if any is necessary) regularly maintained principally to provide the service”.
- The general public ordinarily consists of buyers other than the U.S. Government or its instrumentalities, e.g., U.S. Government corporations. Contracting officers can continue to exclude sales for Government end use, **as long as this can be determined without requiring information from the offeror** (e.g., on how their customers inventory and use the items).
- When counting sales to the general public, continue to exclude sales to affiliates of the offerors or purchases by the U.S. Government on behalf of foreign governments, such as for Foreign Military Sales.

\$ In lieu of preparing an SF 1412, the new provision at §52.215-41 requires offerors to submit the following information when requesting a catalog price exception:

- A copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which this proposal is being made.
- A copy or description of current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, and reseller.
- Evidence of substantial sales to the general public for each catalog item that exceeds an amount designated by the contracting officer (extended value, not unit price). This may include sales orders, contracts, shipments, invoices, actual recorded sales or other records that are verifiable. In addition, if the basis of the price proposal is sales of essentially the same commercial item by affiliates, other manufacturers or vendors, those sales may be included.
- An explanation of the basis of each offered price and its relationship to the established catalog price. When substantial general public sales have also been made at prices other than catalog or price list prices, the offeror shall indicate how the proposed price relates to the price of such recent sales in quantities similar to the proposed quantities.

FUNCTION BY FUNCTION CHANGES

\$ The provision at §52.215-41 requires offerors to submit the following information to support requests for the market price exception:

- Market price information, include the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts.
- A description of the nature of the market.
- Data supporting substantial sales to the general public.

\$ Since the SF 1412 has been eliminated, the Government no longer has the right established by that Standard Form to audit contractor records after award “until the expiration of 3 years from the date of final payment under a contract resulting from this proposal.” The provision at §52.215-41 instead grants the contracting officer or an authorized representative the right to examine, **at any time before award**, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

If this access right is NOT adequate, the contracting officer may draft different language regarding preaward and/or postaward access to contractor records to the extent necessary for evaluating the proposed price.

New Exception for Commercial Items

\$ There is a new exception for commercial items. To determine the applicability of this exception, seek information from the contractor and/or other sources on prices at which the same or similar items have been sold in the commercial market. When requesting such information for this exception:

- Limit, to the maximum extent practicable, the scope of requested pricing information to include only information that is in the form regularly maintained by the offeror in commercial operations.
- Limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.

[§15.804-1(a)(2), §15.804-1(b)(4) and §15.804-5(b), FAC 90-32, Case 94-721, CSW Unit 38, New Task]


FUNCTION BY FUNCTION CHANGES

\$ Grant the exception ONLY IF

- The pricing information is adequate for evaluating, through price analysis, the reasonableness of the price of the action, AND
- The contracting officer does NOT have sufficient information to support a FAR §15.804-1(a)(1) exception (e.g., an exception based on adequate price competition, catalog pricing, market pricing, or prices fixed in law or regulation) or, for modifications, a §15.804-1(a)(4) exception. [§15.804-1(a)(2) & §15.804-1(b)(4), FAC 90-32, Case 94-721, CSW Unit 38, New Task]

\$ The new clause at §52.213-43 authorizes the Government to examine the pricing information provided by the offeror, Contractor, or subcontractor, for the new commercial item exception at §15.804-1(a)(2)— along with all records that directly relate to such information. Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the marketplace. This right expires two years after the date of award of the contract, or two years after the date of any modification to the contract. Use this clause when the “commercial item” exception alone applies — do not use it if the catalog or market price exception applies. [§52.213-43, FAC 90-32, Case 94-721, CSW Unit 38, New Task]

Pricing of commercial items

 When contracting by negotiation for commercial items, comply with the policies and procedures in Part 15 to establish the reasonableness of prices.

- If pricing information is necessary for the “commercial item exception” at 15.804-1(a)(2), insert the provisions and clauses in the Part 12 solicitation prescribed in 15.804-8 and 15.106 for this purpose.
- If cost or pricing data are required, insert the provisions and clauses prescribed in 15.804-8 and 15.106 in an addendum to the solicitation and contract.
- When a contract is priced using the exceptions at 15.804-1(a)(1), no cost or pricing data may be obtained for modifications unless the proposed modification would change the contract from a contract for a commercial item to a contract for other than a commercial item (see 15.804-1(b)(6)).
- If the exceptions at 15.804-1(a)(1) are not applicable, the contracting officer may be required to obtain cost or pricing data to determine the reasonableness of prices for subsequent modifications (see 15.804-2(a)(1)) and the contracting officer shall insert the provisions and clauses prescribed for this purpose in an addendum to the solicitation and contract. In particular, §15.106-2 requires flowdown of the clause at §52.215-43, Audit—Commercial Items, for incorporation in subcontracts covered by the commercial item exception.

[§12.209, FAC 90-32, Case 94-970; §15.106-2, §15.804-1(b)(6) & 52.215-43, FAC 90-32, Case 94-721, CSW Unit 38, New Task]

FUNCTION BY FUNCTION CHANGES

Requiring Information Other Than Cost or Pricing Data

\$ The contracting officer may require submission of information other than cost or pricing data — but only to the extent necessary to determine price reasonableness or cost realism.

- Use the contractor's format for submitting such information unless use of a specific format is essential.
- Ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price.
- Do NOT require contractor to certify such information under §15.804-4.
- Limit requests for updates to information previously supplied by an offeror to that which affects the adequacy of the proposal for negotiations, such as changes in price lists. [§15.804-5(a)(2) , FAC 90-32, Case 94-721, CSW Unit 38, Task 5.1]

\$ For the first time, the FAR defines the term “cost realism” and authorizes contracting officers to request information “to determine the cost realism of competing offers or to evaluate competing approaches”. Table 15-3 states that, “If adequate price competition is expected, the information may include cost or technical information necessary to determine the cost realism and adequacy of the offeror's proposal, e.g., information adequate to validate that the proposed costs are consistent with the technical proposal, or cost breakdowns to help identify unrealistically priced proposals.” [§15.801, 15.804-5(a)(3) and Table 15-3, FAC 90-32, Case 94-721, CSW Unit 38, Task 5.1]

\$ When cost or pricing data are not required because an action is at or below the cost or pricing data threshold, the FAR requires contracting officers to request, as a minimum, “appropriate information on the prices and quantities at which the same or similar items have previously been sold, that is adequate for evaluating the reasonableness of the proposed price. Cost information may also be required. For example, cost information might be necessary to support an analysis of material costs” (when sufficient information on labor and overhead rates is already available). [§15.804-5(a)(4) and Table 15-3, FAC 90-32, Case 94-721, CSW Unit 38, Task 5.1]

The New Standard Form 1448

Offerors can use the SF 1448 as a cover sheet in submitting required information for cost realism analysis or price reasonableness determinations for actions under the cost or pricing data threshold. Information submitted by offerors with this form is NOT considered cost or pricing data and shall NOT be certified in accordance with 15.804-4. On the other hand, the SF 1448 for the first time provides the Government with the right to “examine, at any time before award, any of those books, records, documents, or other records directly pertinent to the information requested or submitted.” See the new FAR Table 15-3 for instructions on the use of the SF 1448. [§15.804-6, Table 15-3, and Standard Form 1448, FAC 90-32, Case 94-721, CSW Unit 38, Task 5.1]



For more information, see Appendix II.

FUNCTION BY FUNCTION CHANGES

Audits

Contract Specialist Workbook, Unit of Instruction 39

Requesting Audits

\$ When reviewing proposed indirect costs, ask the cognizant audit office to determine whether any audits completed during the preceding 12 months addressed those costs. Do not request a new audit of the proposed indirect costs if information from the prior audits is adequate for determining the reasonableness of those costs. [§15.805-5, FAC 90-31, Case 94-740, CSW Unit 39, Task 2]

Flowdown of Audit Rights


\$ Prime contractors are required to incorporate the audit and records clause at FAR 52.214-26 only in those subcontracts expected to exceed the threshold at 15.804-2(a)(1) for submission of cost or pricing data. Previously, prime contracts had to incorporate such clauses in any subcontract over \$10,000. [§52.214-26, FAC 90-31, Case 94-740, CSW Unit 38, Task 1]

\$ Contractors only have to incorporate the audit and records clause at §52.215-2 in subcontracts that exceed the simplified acquisition threshold and:


- That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these; AND/OR
- For which cost or pricing data are required; AND/OR
- That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

This conforms the audit rights at the subcontract level with those at the prime contract level. [§52.215-2; FAC 90-31, Case 94-740, CSW Unit 38, Task 1]

Record Keeping Requirements

 The FAR redefines the term “records” to include not only books and documents but also “accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.” [§4.703, 52.214-26, and 52.215-2; FAC 90-31, Case 94-740, CSW Unit 39, Task 4]

FUNCTION BY FUNCTION CHANGES

 Contractors and subcontractors do NOT have to maintain or produce original records for Government audits if they provide photographic or electronic images of the original records AND all of the following are true: [§4.703, FAC 90-31, Case 94-740, CSW Unit 39, Task 4]

- Electronic records include all significant information from paper originals.
- The imaging process preserves accurate images of the original records, including signatures and other written or graphic images.
- The imaging process is sufficiently reliable and secure to maintain the integrity of the original records.
- An effective indexing system permits timely and convenient access to the imaged records.
- The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

GAO Access to Records

\$ The Comptroller General’s right of access to contractor records is established by the clauses at FAR §52.214-26 and §52.215-2. The clause at §52.215-1 is reserved. The clause at §52.215-2 also stresses that this right of access “may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law”. [§4.702, 15.106-1, 25.901, 52.214-26, and 52.215-2, FAC 90-31, Case 94-740]

\$ A new Alternate III to the clause at FAR §52.215-2 waives the Comptroller General’s right to examine the records of foreign contractors. Do not automatically waive that right. Rather, the FAR requires every reasonable effort to negotiate incorporation of the “basic” clause at FAR §52.215-2 with the Comptroller’s right of access intact — and the FAR maintains essentially the same controls on waivers that formerly applied to decisions about omitting the clause at 52.215-1. [§25.901 and 52.215-2; FAC 90-31, Case 94-740].

Cost Analysis

Contract Specialist Workbook, Unit of Instruction 40

\$ The term “cost analysis” has been redefined to apply equally to the analysis of:

- Cost or pricing data, and
- Information other than cost or pricing data (e.g., information on elements of cost that does not require certification.) [§15.801, FAC 90-32, Case 94-721, CSW Unit 40, Task 1]

FUNCTION BY FUNCTION CHANGES

Competitive Range

Contract Specialist Workbook, Unit of Instruction 42

Awarding Without Discussions

[§52.215-16 Contract Award , FAC 90-31, Case 94-701, CSW Unit 42, Task 1]

☞ For civilian agencies, FAR 52.215-16, Alternate II, expands the Government's right to award without discussions. Under the previous award clause at 52.215-16, the Government's right to award without discussions had been greatly limited in case law. Basically, the Comptroller General only allowed award without discussions when (1) the RFP provided for award to the lowest priced offer in the competitive range and (2) the contracting officer had no reason to believe that discussions would yield a better price. Now, you can award without discussions even in "greatest value" competitions and trade-off the costs of conducting discussions against the possibility of seeing some slight improvement in BAFO prices vis-à-vis those initially proposed.

For DoD, NASA, and Coast Guard, the new Alternate II replaces the prior Alternate III — with no essential change in language. The language of the former Alternate II is now part of the basic provision.

☞ If the RFP included FAR §52.215-16 **absent** Alternate II, establish a competitive range and conduct discussions with all offerors in the competitive range.

If Alternate II was incorporated, determine whether discussions are necessary. If necessary, document the reasons in the contract file. The new FAR language provides no examples of circumstances under which discussions might be necessary. Among potential reasons for discussions:


- No proposal is technically acceptable.
- Only one proposal is technically acceptable, because other offerors appear to have misinterpreted the RFP's requirements.
- All prices appear to be unreasonably high, compared with prior prices or current market prices for like deliverables.
- The lowest offered price appears to be unrealistic (e.g., the product of a potential cost estimating mistake) when compared with the Government estimate.
- All prices are unrealistically low.

FUNCTION BY FUNCTION CHANGES

Negotiation

Contract Specialist Workbook, Unit of Instruction 45


Discussing Past Performance Evaluations

 During discussions, provide an offeror the opportunity to discuss past performance information not previously made available to the offeror for review and comment. This does NOT apply to information on past performance collected under FAR 42.15 — unless the contracting activity had failed to provide contractors with opportunities to review and comment on the past performance records as required by that FAR section.

During discussions, DO NOT disclose the names (or other identifiers) of individuals which provided reference information on the offeror's past performance. [§15.610, FAC 90-26, CSW Unit 45, Task 2]

Mistakes in Offers

Contract Specialist Workbook, Unit of Instruction 46

 When correcting apparent clerical mistakes in electronic bids, include as part of the electronic solicitation file:

- The original bid
- The verification request
- The bid verification.

[§14.407-2; FAC 90-29, Case 91-104, CSW Unit 46, Task A3]

FUNCTION BY FUNCTION CHANGES

Responsibility

Contract Specialist Workbook, Unit of Instruction 47

“List of Parties Excluded from Federal Procurement and Nonprocurement Programs”

☞ Before awarding a contract, contracting officers must check the General Services Administration (GSA) “List of Parties Excluded from Procurement Programs” and the **new** GSA reciprocal “List of Parties Excluded from Federal Procurement and Nonprocurement Programs.” Organizations suspended, debarred, or otherwise excluded from “nonprocurement transactions” are now also ineligible for Federal contracts and vice versa. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. [§9.4, FAC 90-28, CSW Unit 47, Task 1]

Historically, GSA maintained two separate lists of parties that are prohibited from receiving Government contracts (the Procurement List) and benefits such as grants and cooperative agreements (the Non-Procurement List). Parties on the Non-Procurement List were eligible to receive contracts as long as their names were not also on the Procurement List, and vice versa. Starting on August 25, 1995, newly initiated suspension and debarment actions will apply equally to procurement and nonprocurement transactions if the Agency Debarring Official issues an appropriate notification letter.

GSA will maintain three lists until all suspensions and debarments have Governmentwide effect on both procurement and nonprocurement transactions. Eventually, there will only be one unified reciprocal list.

No Preaward Surveys When Acquiring Commercial Items

✂ Do NOT request a preaward survey if the contemplated contract involves the acquisition of commercial items, unless circumstances justify the cost. The previous criterion: a contemplated contract with a fixed price of less than \$100,000 that involves commercial items. [§9.106-1, FAC 90-32, Case 94-970, CSW Unit 47, Task 5]

Past Performance As A Responsibility Factor

☞ Contracting officers must consider “relevant past performance information” collected pursuant to subpart 42.15. However, contracting officers may not call a vendor “nonresponsible” solely on the basis of a lack of relevant performance history “except as provided in 9.104-2”. [§9.104-2, FAC 90-26, CSW Unit 47, Task 8].

FUNCTION BY FUNCTION CHANGES

Subcontracting Requirements

Contract Specialist Workbook, Unit of Instruction 48

Goals For Subcontracting With Women Owned Small Business Concerns

☞ The FAR requires contracting officers to negotiate a separate percentage goal in subcontracting plans for women-owned small business concerns. Contractors are liable for liquidated damages if they fail to attain those goals on the same basis and under the same conditions that they are liable for failing to attain goals for subcontracting with small disadvantaged small businesses and small businesses generally. Contracting officers also may negotiate monetary incentives for exceeding goals for subcontracting with women-owned small business concerns pursuant to §52.219-10, [§19.702, §19.704, §19.708, §19.9, §26.104, §42.302, §52.219-9, §52.219-10, and §52.219-13, FAC 90-32, Case 94-780, CSW Unit 48, Tasks A1, A2, A2.1, and B4]

Award

Contract Specialist Workbook, Unit of Instruction 50

Electronic Notifications

☞ Contracting officers can use electronic rather than paper medium to transmit preaward notices, postaward notices, and notices of award. [§14.408-1, §14.409-1, Subpart 15.10, and §36.304; FAC 90-31, Case 94-701, CSW Unit 50, Tasks 2-4]

Notification Deadlines

☞ Notify unsuccessful offerors within three days after award. Consider notification by registered mail, with return receipt requested, or E-Mail with automatic return receipt, or fax if your fax software or hardware verifies receipt by the receiving fax station. For the purpose of this section, “day” means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday. [§14.409-1, §15.1002, §25.405, and §36.304, FAC 90-31, Case 94-701, CSW Unit 50, Task 4]

New FPDS Fields

☞ There are new FPDS reporting fields for awards to small disadvantaged business concerns, women owned business concerns, number of offers, award of task order contracts, and awards for commercial items. OFPP is revising the form. [§4.601, FAC 90-31, Case 94-701, CSW Unit 50, Task 4]

FUNCTION BY FUNCTION CHANGES

Debriefing

Contract Specialist Workbook, Unit of Instruction 51

Requests for Debriefings

☞ Offerors (including awardees — not just the unsuccessful) may request debriefings whenever award is on the basis of competitive proposals, whether or not the contracting officer conducted discussions and whether or not award was on price and price related factors alone. [§15.1004, FAC 90-31, Case 94-701, CSW Unit 51, Task 1.1]

Conducting Debriefings

☞ Debriefings can be by electronic or any other method acceptable to the contracting officer. [§15.1004, FAC 90-31, Case 94-701, CSW Unit 51, New Task — Determine method of debriefing]

☞ Contracting officers are responsible for chairing debriefings (unless unavailable, in which case the contracting officer may designate a representative to serve as the chair with approval from an individual who is a level above the contracting officer). “Individuals actually responsible for the evaluations shall provide support”. [§15.1004, FAC 90-31, Case 94-701, CSW Unit 51, Tasks 2-4]

Debriefing Do's and Don't's

☞ Previously, the FAR required only that the Government share its evaluation of the significant weaknesses or deficiencies in the offeror's proposal. In addition, the Government team must at minimum now provide information on:

- The overall evaluated cost to the Government and technical rating of the successful offeror and the debriefed offeror, if applicable.*
- The overall ranking of all offerors when any ranking was developed by the agency during the source selection.*
- A summary of the rationale for award.*
- For commercial end items delivered under the contract, the make and model of the awardee's deliverable.*
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(* do not apply to A&E contracts)

FUNCTION BY FUNCTION CHANGES

Purpose -- to facilitate frank and open discussions leading to better proposals on future procurements. In fact, the FAR never prohibited COs from providing the above information. The difference is that providing such information is now mandatory. COs will need to budget more time for debriefings. [§15.1004 and §36.607(b), FAC 90-31, Case 94-701, CSW Unit 51, Tasks 3-4]

☞ However, you still may NOT provide point by point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, you still may NOT reveal any information exempt from release under the Freedom of Information Act, including—

- Trade secrets.
- Privileged or confidential manufacturing processes and techniques.
- Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information. [§15.1004, FAC 90-31, Case 94-701, CSW Unit 51, Tasks 3-4]

☞ The FAR also requires contracting officers to protect the names of individuals providing reference information about an offeror's past performance. [§15.1004, FAC 90-26, CSW Unit 51, Tasks 3-4]

Summarizing the Debriefing for the Record

☞ You must prepare an “official” summary of the debriefing for the contract file. The FAR doesn’t detail the contents of this summary. It could take the form of a memorandum for the record. Include a copy of the script, if you have such. Also include a list of questions and the provided answers. [§15.1004, FAC 90-31, Case 94-701, CSW Unit 51, Task 5]

Availability of Information from Debriefings to Prospective Offerors

☞ If, within one year of the protested contract award, you issue a new solicitation or request for BAFOs, make the following information available to all prospective offerors:

- Information on the successful offeror’s proposal provided in any debriefings on the original award.
- Other nonproprietary information that would have been provided to original offerors.

Purpose: To ensure that an offeror debriefed is not an offeror with an unfair competitive edge. You can comply with this policy by making available the official written summary of any one of the actual debriefings — after expunging proprietary information on the debriefed offeror's proposal. You can either provide such information with the new solicitation or notify all offerors that the information is available at a specified location. [§15.1004, FAC 90-31, Case 94-701, CSW Unit 51, New Task — Make debriefing information available to prospective offerors.]

FUNCTION BY FUNCTION CHANGES

Protests

Contract Specialist Workbook, Unit of Instruction 52

Changes that apply to protests generally (to the agency, GAO, or GSBCA):

☞ “Day” is expressly defined as meaning “calendar” day, unless otherwise specified. To calculate a period of time, start the clock on day two after the “act, event, or default from which the designated period of time begins to run”. Stop the clock one day after the end of the period, unless:

- That day is a Saturday, a Sunday, or a legal holiday (in which case, carry the period over to the next business day); or
- In the case of a filing of a paper at any appropriate administrative forum, that day is a day on which weather or other conditions causes the closing of the forum for all or part of the day. In that case, stop the clock on the very next day that the administrative forum opens its doors for business.

However, when calculating the time period for filing a protest that would result in a suspension, the clock can stop on a Saturday, Sunday, or legal holiday. This applies both to the 5-day period after a debriefing date and the 10-day period after contract award.

“Filed” with the agency means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m. local time. “Filed” with the GAO means the receipt by GAO by 5:30 p.m., eastern time. [4 CFR §21.0]

These definitions are critical in determining whether a protest is timely or not, as well as in determining other timeframes for actions by interested parties and the protest forum. [§33.101, FAC 90-32, Case 94-730, CSW Unit 52, all tasks]

☞ Interested parties may protest cancellations of solicitations. Interested parties also may protest cancellation or termination of award, if the protester alleges in writing that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. This has long been accepted practice but is now explicit in the FAR. [§33.101, FAC 90-32, Case 94-730. CSW Unit 52, Tasks A2 and B2]

☞ If the protest is upheld, reimbursable protester’s costs are exclusive of profit. The agency must use funds available for the procurement to pay the costs awarded.

Examples of protest costs now include consultant and expert witness fees. However, the FAR also specifies limits on attorney (basically \$150 an hour, with some flexibility to pay a higher rate under some circumstances) fees and on consultant and expert witness fees (i.e., “the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and Expert and Consultant Appointments, **60 FR 45649, September 1, 1995** (CFR 304.105)”) that apply to all but small business concerns. Moreover, treat the cap on attorneys’ fees as a bench-

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mark in determining what is a "reasonable" level for attorneys' fees for small businesses. [§33.104(h), FAC 90-32, Case 94-730. CSW Unit 52, Tasks A5 and B9]

☞ The Government is authorized to recover protest costs from the awardee when the agency sustains a post award protest because of the awardee's intentional or negligent misstatement, misrepresentation, or miscertification. The Government may recover such costs by offsets against the contract. Also consider referring the matter to the agency's debarment official.

Steps in recovering protest costs:

1. Determine whether to demand reimbursement (given such factors as amount of the debt, degree of the awardee's fault, and costs of collection).
2. Determine whether to recover such costs by offset against the contract, another contract with the awardee, or by other available means.
3. If the contracting officer's decision is to demand reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary.
4. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to (a) inspect and copy related agency records to the extent permitted by statute and regulation and (b) request review of the matter by the head of the contracting activity.

[§32.602(h), 33.102(b)(3), 33.104(h)(7), 33.105(g)(5) and 52.233-3, FAC 90-32, Case 94-731. CSW Unit 52, Task B10]

Often as the result of discovery during a protest, the Government learns of intentional or negligent misstatements, misrepresentations, or miscertifications by the awardee that could not have been reasonably known to agency evaluators prior to award. A protest may be sustained where the award has been induced by a material misrepresentation by the awardee. Contracting activities have been without effective remedy in such cases. Theoretically, the agency could ask the Department of Justice to file a lawsuit against the offeror making the misrepresentations. However, due to the heavy workload of the Justice attorneys, this is not a practical alternative.

The FAR change does not adversely affect any substantive right of an offeror. Under the proposed language, the Government remedy is to offset such costs on the same or an unrelated contract. If the offeror believes that the offset is not justified, it may appeal the action to the agency, or under the Contract Disputes Act to either a Board of Contract Appeals or the Court of Federal Claims.

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Agency Protests

☞ Protesters now must file protests not later than 14 days, rather than 10 working days, after the basis of the protest is known or should be known (although a contracting officer — for good cause shown or where the protest raises significant issues — may consider late protests). [§33.103(b), FAC 90-32, Case 94-730, CSW Unit 52, Task A2]

☞ Before, the agency could reject any protest that was not concise or logically presented. Now, the protest must “substantially” fail one or the other of these tests. [§33.103(b), FAC 90-32, Case 94-730. CSW Unit 52, Task A2]

☞ If the protest is upheld, the agency head can take any action available to the Comptroller General pursuant to upholding a bid protest and pay appropriate costs as stated in Section 33.104(h). This includes payment of the protester’s costs, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded. Prior to this FAR change, whether agencies have had such authority has always been in question. There is no point in going through the GAO process if the protester’s only reason for going to GAO is to obtain reimbursement for attorney fees. [§33.102(b), FAC 90-32, Case 94-7300. CSW Unit 52, Task A5]

☞ Furnish a copy of the protest ruling by certified mail return receipt requested or by any other method that provides evidence of receipt. [§33.102(b), FAC 90-32, Case 94-7300. CSW Unit 52, Task A6]

In the past, when the protest would arrive at GAO, the Government often did not know when the protester had received the CO’s decision in response to an agency protest, because the response had been sent by first class mail. Thus, the Government would not know when the time period for filing the protest had expired. Hence, we need evidence of the date and time of receipt by the protester. Certified mail is one solution. Or you can fax the agency response where the fax automatically generates the message received sheet. Or by e-mail, where there is an electronic, save to disk message that the recipient has received the message.

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Protests to GAO

☞ What governs? FAR or GAO's Bid Protest Regulations? Answer: GAO's Regulations, as published at 4 CFR 21. [§33.104, FAC 90-32, Case 94-730. CSW Unit 52, Part B]

☞ If award has not been made, the contracting officer has to notify "all parties who appear to have a reasonable prospect of receiving award if the protest is denied". The test used to be "substantial and reasonable". [§33.104(a)(2), FAC 90-32, Case 94-730. CSW Unit 52, Task B1]

☞ Within the period for timely filing of a protest to GAO, contracting officers may stay performance of a contract upon a written determination (1) that a protest is likely and (2) that delaying performance is in the Government's best interests. At issue is the Government's liability if the contractor begins performance and then has to stop as the result of an actual filing (if a protest is in fact filed). There is no liability if you stay the award.

Note— If immediately prior to award, you believe that the likely protester has good reason for a protest and that the likely protest should be sustained, consider immediate corrective action at the agency-level (e.g., cancel and resolicit rather than award). [§33.102(d), FAC 90-32, Case 94-730. CSW Unit 52, Task B3]

☞ In protests after award, suspend performance or terminate the awarded contract — absent a written determination to the contrary by the Head of the Contracting Activity (HCA) per FAR 33.104(c)(2)) — if you receive notice of a protest from the GAO within 5 days after the debriefing date offered to the protester if (1) the protester asked for a debriefing and (2) the Government was required to provide the requested debriefing. In this case, you must suspend performance or terminate the awarded contract even if more than 10 days have passed since award of the contract. [§33.104(c), FAC 90-32, Case 94-730 & also 4 CFR §21.6(c). CSW Unit 52, Task B3]

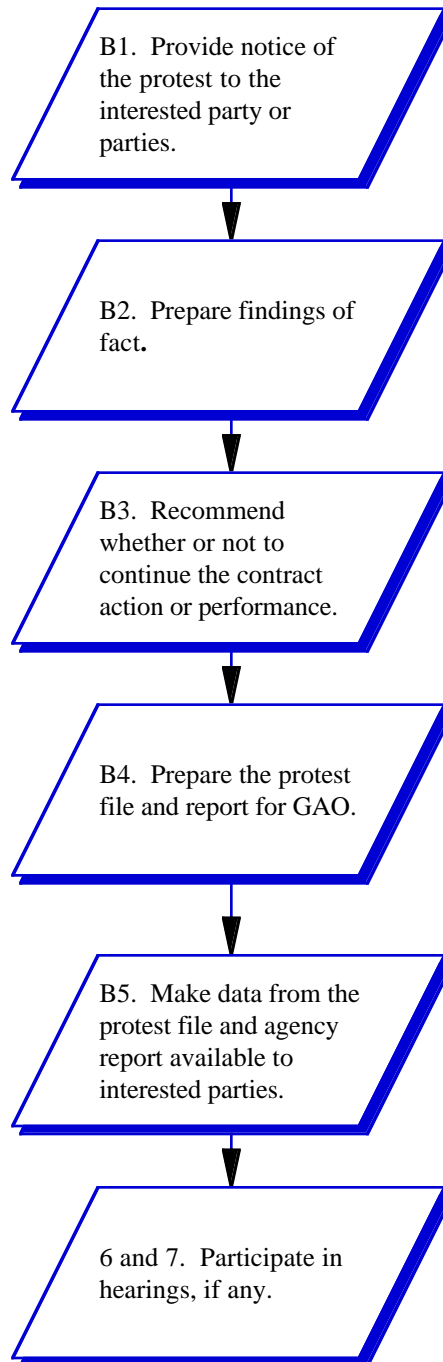
☞ The FAR identifies the documents that are part of a "protest file" — and differentiates those documents from other information in the administrative report to GAO.

Protest files include:

- An index of all documents.
- The protest.
- The offer of the protesting offeror and the offer being considered for award or protested.
- The solicitation, including specifications or portions relevant to the protest.
- All relevant evaluation documents.
- Abstract of offers or relevant portion.
- Any other relevant documents, including documents specifically requested by the protester.

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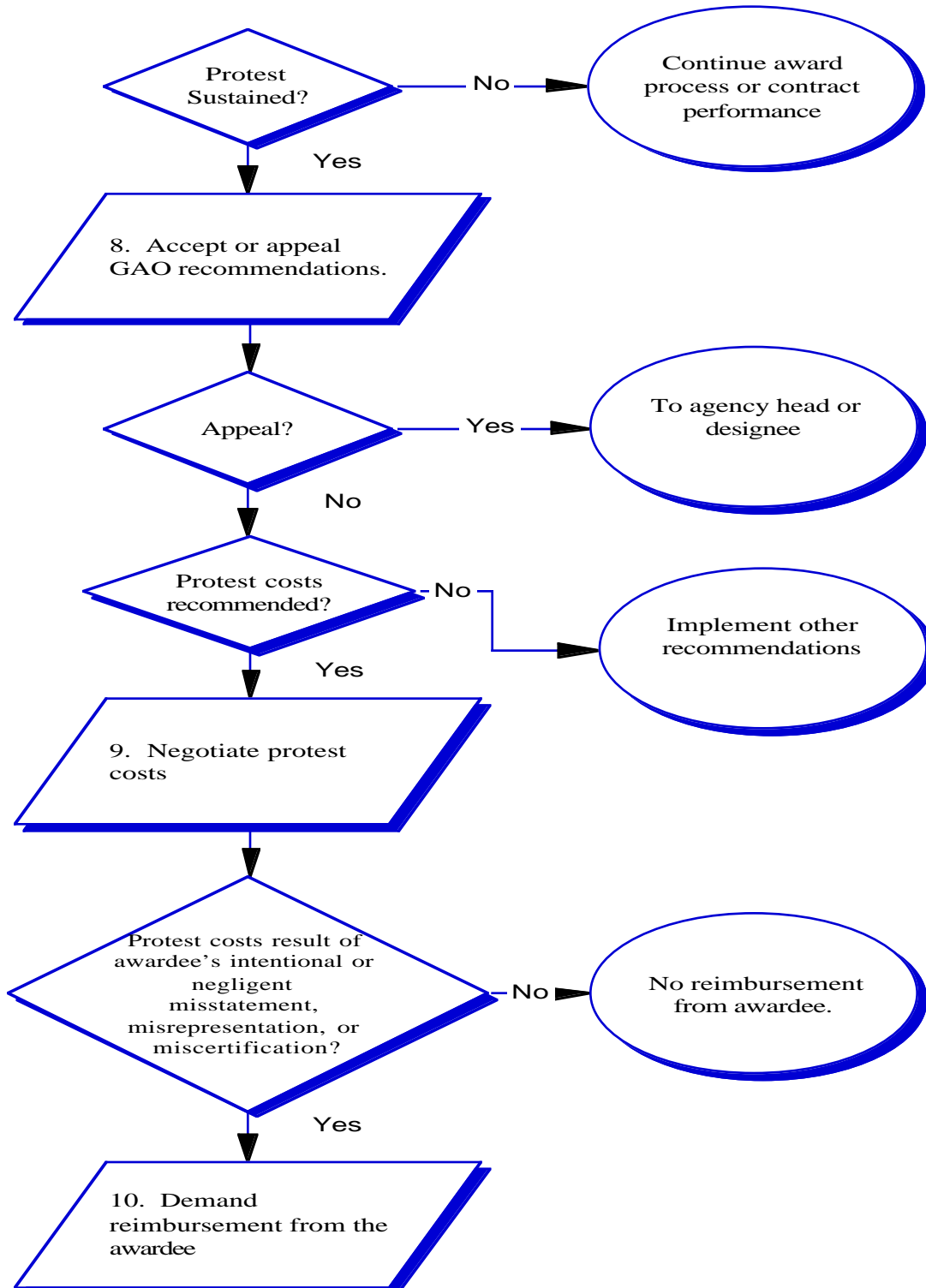
PROTESTS TO GAO



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In addition to the protest file, the administrative report to GAO includes:

- The contracting officer's signed statement **of the relevant facts** (i.e., findings of fact, actions taken, recommendations, and any additional evidence or information necessary to determine the protest's validity).
- **A memorandum of law.**
- List of other parties receiving a copy of the report.
- List of documents withheld from the protester and other interested parties (annotated to identify any specifically requested by the protester) and reasons for withholding. [§33.104(a)(3), FAC 90-32, Case 94-730. CSW Unit 52, Task B4]

☞ Agencies used to have 25 “**working**” days to deliver the “agency administrative” report to GAO (or 10 if GAO uses the “express option”). The timeframes are now 35 and **20** (for the express option) days as the term “day” is now defined at FAR §33.101. Since the new definition of day is geared to calendar days rather than working days, the new timeframes are basically equivalent to the prior timeframes. [§33.104(a)(3), FAC 90-32, Case 94-730. CSW Unit 52, Task B4]

☞ You must provide actual or prospective offerors reasonable access to the protest file, other than for information exempt from disclosure under a GAO protective order (if any) and the Freedom of Information Act (section 552 of title 5, U.S.C.). Such access can be denied, however, if the GAO dismisses the protest before the documents are submitted to the GAO. Make the file available to “nonintervening actual or prospective offerors” within a reasonable time after submittal of an agency report to the GAO. [§33.104(a)(3)(ii), FAC 90-32, Case 94-730 and 4 CFR §21.3(c). CSW Unit 52, Task B5]

☞ Furnish a “redacted” version of the protest to other interested parties when the protester has requested a protective order for “sensitive” material therein. The protester is responsible for preparing the “redacted” version and furnishing that version to GAO. [§33.104(a)(2), FAC 90-32, Case 94-730 & also 4 CFR §21.1(f), CSW Unit 52, Task B5].

☞ GAO protective orders establish terms, conditions, and restrictions on disclosure of information related to the protest. Protected information includes procurement sensitive information, trade secrets or other proprietary or confidential research, and development or commercial information (i.e., basically the same information protected under the Freedom of Information Act). Protective orders may not bar disclosure to the Congress (under Congressional oversight authority) or an executive agency, such as the Small Business Administration, under its oversight authority. The policies are new to the FAR but in fact are not really different in substance from prior practice. [§33.104(a)(5), FAC 90-32, Case 94-730 and also 4 CFR §21.3(d), CSW Unit 52, Task B5]

☞ After the protester receives the administrative report, the protester may ask for additional documents. This request is timely only if made “within 2 days after the protester knew the exis-

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tence or relevance of additional documents, or should have known”. Before, the protester had to ask for the documents within the two day period following the protester’s receipt of the administrative report. [§33.104(a)(4)(ii)(A), FAC 90-32, Case 94-730. CSW Unit 52, Task B5].

☞ GAO has the same amount of time to issue a decision generally (notwithstanding the switch from working days to calendar days), but can take more time to issue a decision under the express option.

- Ordinarily, GAO has to issue a decision in 125 calendar days (vs. the prior 90 “working” days).
- Under the express option, GAO has 65 calendar days to issue a decision (vs. the prior 45 calendar days). [§33.104(f), FAC 90-32, Case 94-730 & also 4 CFR §21.9. CSW Unit 52, Task B8]

☞ If the agency has not fully implemented the GAO recommendations within 60 days of receipt, the head of the contracting activity (HCA) must report its failure within 5 days (i.e., no later than 65 days following receipt of the recommendations). The report shall explain the reasons why the GAO's recommendation exclusive of costs, has not been followed by the agency.

In the past, the HCA had to file a report with GAO within 60 days of receipt of the recommendations if, and only if, the HCA decided not to comply with the recommendation. Now, the report must be filed even if the HCA has accepted the recommendations but not yet fully implemented them (which is likely to be the case for such recommendations as recompeting the contract). [§33.104(f), FAC 90-32, Case 94-730. CSW Unit 52, Task B8]

☞ When GAO recommends payment of protest costs, the FAR instructs the agency and protester to negotiate an agreement on the quantum. Contractors may NOT include any paid protest costs in subsequent proposals, billings, or claims against the Government. Reflect those exclusions in the cost agreement.

If the negotiations fail, the protester can ask GAO to recommend an amount. If the agency fails to pay that amount, the agency must “promptly” report its rationale to GAO. [§33.104(h), FAC 90-32, Case 94-730. CSW Unit 52, Task B9]

The proposed GAO regulation requires the protester to file a claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 90 days after receipt of GAO’s recommendation that the agency pay the protester its costs. If the contractor fails to meet that deadline, it forfeits its rights to recover costs (unless it can persuade GAO to consider an untimely claim for good cause shown). If the agency and protester fail to reach agreement on the claim, GAO can recommend that the agency also pay the protester the costs of pursuing the claim for costs before GAO. Finally, the contracting agency must notify GAO within 60 days of receipt of the recommendation of its actions pursuant to that recommendation. (4 CFR §21.8. CSW Task Unit 52, B9]

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Protests to GSBICA

☞ The GSBICA publishes its procedures for protests at 48 CFR Chapter 61 (GSBICA Rules). If FAR Part 33 guidance concerning GSBICA procedure conflicts with GSBICA's rules, GSBICA's rules govern. [§13.105, FAC 90-32, Case 94-730, Unit 52 Part C]

☞ The provision at 52.233-2, *Service of Protest*, now contains the following language: “(c) In this procurement, you may not protest to the GSBICA because of the nature of the supplies being procured. (Contracting officer shall strike the word "not" where the GSBICA is a correct forum.)”. Contracting officers must therefore be skilled at distinguishing requirements for Federal Information Processing resources for which the GSBICA is a proper protest forum from other types of requirements. Offerors may protest the contracting officer's classification of a requirement as being a non-FIPS requirement. But this protest must be lodged before the closing date for submitting proposals. Afterwards, that protest might not be considered “timely” and dismissed forthwith. [§52.233-2, FAC 90-32, Case 94-730, Unit 52 Part C]

☞ At present, GSBICA can direct the procurement be suspended in its entirety. The FAR would now allow an agency, notwithstanding that direction, to continue the procurement process up to but not including award of the contract unless the Board determines such action is not in the best interests of the United States. [§33.105(d)(4), FAC 90-32, Case 94-730, Unit 52 Part C]

☞ The GSBICA may declare an appropriate prevailing party to be entitled to the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees; and bid and proposal preparation costs. The FAR requires the agency, if it is the payer of such costs, to reimburse the Permanent Indefinite Judgment Fund “out of funds available for the procurement”. [§33.105(g), FAC 90-32, Case 94-730, Unit 52 Part C]

☞ If the Government and protester reach a settlement that involves any direct or indirect expenditure of appropriated funds, the agreement must be entered into the public record before dismissal of the protest. If an agency is party to the agreement, the agency must provide the GSBICA with a copy of the agreement and a memorandum signed by the CO. The memorandum must detail the: [§33.105(f), FAC 90-32, Case 94-730, Unit 52 Part C]

- Procurement.
- Grounds for protest.
- Government's position regarding the grounds for protest.
- Terms of the settlement.
- Agency's position regarding the propriety of the award or proposed award of the contract at issue in the protest.

[Note: the FIRM is being amended to allow issuance by authorized officials of after-the-fact DPAs covering a requirement that the agency initially thought was for other than FIPS resources (until informed otherwise by the GSBICA in response to a protest). With such a DPA in

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hand, contracting activities can ratify originally executed contracts — preaward procurement actions would not have to be redone.


This solves the problem arising from the fact that protests to the GSBCA have resulted in decisions that requirements really were for FIP resources even though the agency originally thought otherwise. Having made such a decision, the procurement would then be entirely overturned because it had proceeded without a proper DPA in hand. The new FAR language allows such procurements to be ratified rather than redone.]


Ordering Against Contracts and Agreements

Contract Specialist Workbook, Unit of Instruction 56

Placing Delivery Orders

 Contracting officers may use an “established electronic communications format” to place orders against Federal Supply Schedules. [§8.405-2, FAC 90-29, Case 91-104, CSW Unit 56, Task A4]

 Orders against indefinite contracts may be placed electronically, using electronic commerce methods. [§16.506, FAC 90-29, Case 91-104, CSW Unit 56, Task A4]

 Contracting officers may request supplies or services from a “JWOD participating nonprofit agency” in “writing” rather than by a “letter” request. That is, the request can be transmitted by electronic means rather than through the mails. [§8.705-3, FAC 90-29, Case 91-104, CSW Unit 56, Task A4]

Steps In Placing Orders Against Multiple Award Task Order Contracts (New)

1. Determine whether the requirement may be ordered under the contract.

- Does the order clearly describe all services to be performed or supplies to be delivered? Is the work within scope, period and maximum value of the contract? [§16.505(a)(2), FAC 90-33, Case 94-711]
- Is the order barred by any other limitations (e.g., on nonpersonal services) in the contract or the FAR?
- Is the order in line with all restrictions on advisory and assistance contracts (FAR subpart 9.5)?

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2. Determine whether to consider more than one awardee for the order (if only one awardee will be considered, go to task 4).

You need NOT give all awardees an opportunity to be considered for a particular order in excess of \$2,500 if the contracting officer determines that one or more of the following apply.

- The agency need is of such urgency that considering all awardees would result in unacceptable delays.
- Only one such contractor is capable of providing such services or supplies required at the level of quality required because the services or supplies ordered are unique or highly specialized.
- A sole-source order is in the interest of economy and efficiency as a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.
- An order must be placed with the awardee to satisfy a minimum guarantee.
[§16.505(b)(2), FAC 90-33, Case 94-711]

3. Considering all awardees, select awardees for informal solicitation.

Contracting officers can provide fair consideration to every awardee without contacting all awardees prior to placing an order. The question is whether (1) the procedures in the contract require pre-placement notification to all vendors and, if not, (2) the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. [§16.505(b)(1), FAC 90-33, Case 94-711]

4. Informally solicit and evaluate an offer(s) from the awardee or selected awardees.

For this purpose, use the selection criteria and procedure specified in the contract. In pricing an order, the “competing independently” criterion for “adequate price competition” is satisfied when:

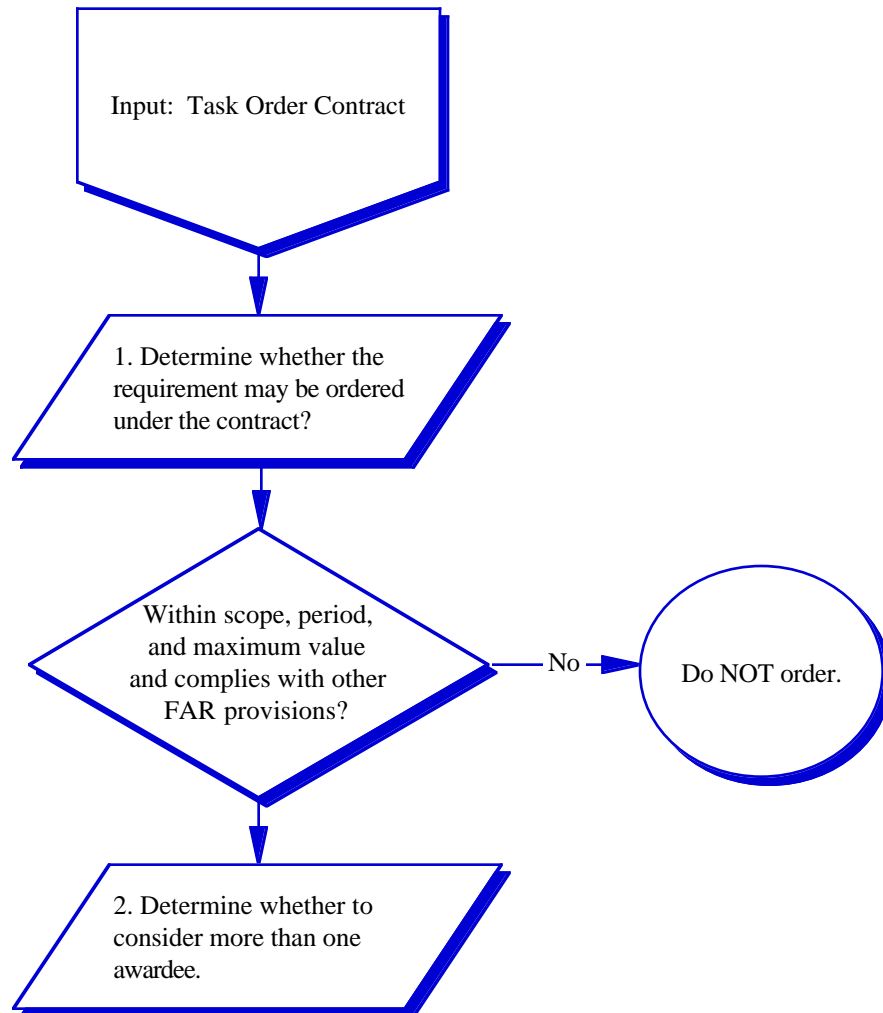
- The price of the task is established in the contract at the time of contract award; or
- The contracting officer solicits offers from two or more awardees for order placement. [§16.505(b)(3), FAC 90-33, Case 94-711]

See Appendix II (CSW Unit 38, “Pricing Information from Offerors”) for more details on the adequate price competition exception.

When negotiating prices based on estimates of direct labor hours by skill category, pay special attention to such matters as professional employee compensation, uncompensated overtime, and cost realism (*see AFIT/FAI textbooks for Cost Analysis and Intermediate Contract Pricing*).

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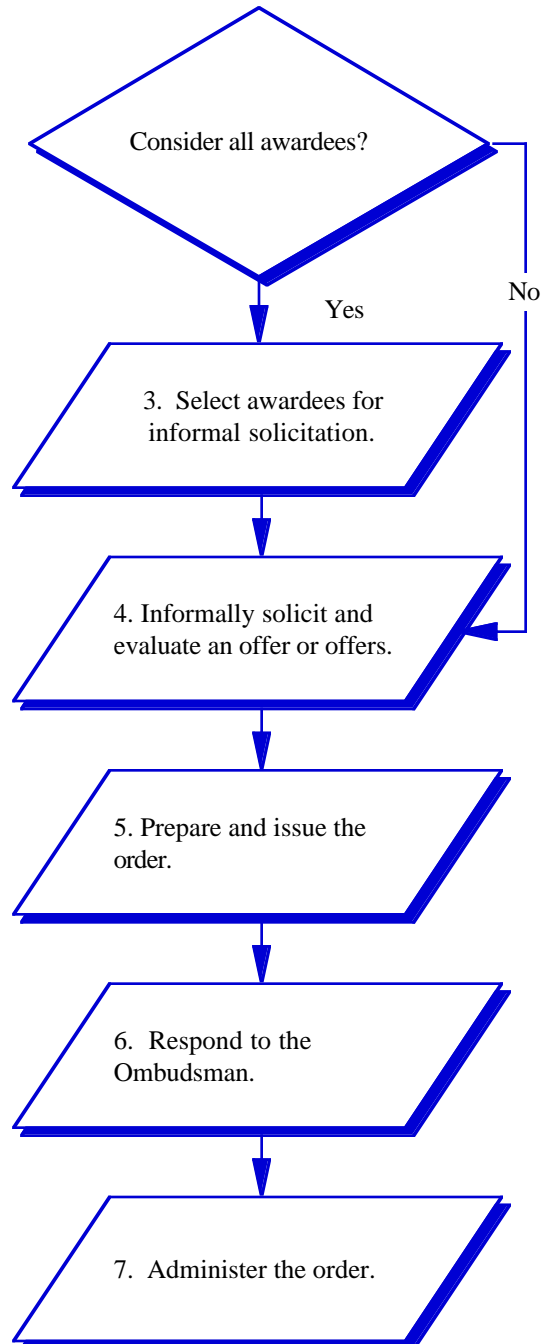
Placing Orders Against Multiple Award Task Order Contracts



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5. Prepare and issue the order.

When informally soliciting offers and placing orders, there is no requirement for worldwide publicity (e.g., a CBD synopsis) under §5.201. [§16.505(a), FAC 90-33, Case 94-711]

6. Respond to the appropriate “Task Order Contract And Delivery Order Contract Ombudsman”.

This will be necessary if the Ombudsman has any questions about the manner in which an order was placed. An ombudsman is a senior agency official independent of the contracting officer. His/her job is to review complaints from awardees and ensure that all are afforded a fair opportunity to be considered, consistent with the procedures in the contract. [§16.505(b)(4), FAC 90-33, Case 94-711]

GAO and GSBICA will not hear protests of the manner in which an order was placed with an awardee unless the protest alleges that the order increases the scope, period, or maximum value of the contract. [§16.505(a)(7), FAC 90-33, Case 94-711]

7. Administer each order.

Past Performance As A Screening Criterion In Soliciting Cost Proposals

☞ When placing Time and Material or cost type orders, carefully consider information on how awardees have performed on past orders — in terms of identifying the awardee who has had the best track record in providing quality deliverables, controlling costs, and minimizing the need for Government oversight. You might ask that awardee alone for a complete cost proposal on an upcoming order, if:

- That awardee’s past performance clearly exceeds the performance of other awardees on this criterion,
- The task order contract states that past performance information may be used in this manner to place awards, and
- The awardee also satisfies other selection criteria (if any) in the contract (e.g., technical capability to perform the specific work of the upcoming order).


You may also consider using past performance information in a comparable fashion for repetitive fixed price orders.

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Monitoring, Inspection, And Acceptance

Contract Specialist Workbook, Unit of Instruction 58

Contractor Requests

 Make every reasonable effort to respond in writing within 30 days to written requests from small business concerns regarding contract administration matters. Otherwise, transmit within that 30 day timeframe written notice of the specific date by which the contracting officer expects to respond. (This requirement does NOT apply to a request for a contracting officer decision under the Contract Disputes Act of 1978). [§42.1601, FAC 90-32, Case 94-730, CSW Unit 58, Task 1]


Subcontractor Requests for Information

If requested by a subcontractor or supplier under a Federal contract for a non-commercial item, promptly advise the subcontractor or supplier as to—


- Whether the prime contractor has submitted requests for progress payments or other payments under the contract to the Federal Government; and
- Whether final payment under the contract has been made by the Federal Government to the prime contractor.

Exception: Information properly classified under an Executive Order. [§32.112-2, FAC 90-32, Case 94-762, CSW Unit 58, Task 1]

Ratifying Constructive Changes


 On constructive changes, the ratifying official now is any official with current authority to execute the contract action. Before, the ratifying official was the individual who had authority to execute the contract action at the time such action was necessary. [§1.602-3, FAC 90-32, Case 94-730, CSW Unit 58, Task 2]


In-Process Inspection

 Do not require offerors to submit to in-process inspection by the Government unless that is a customary market practice for the commercial item being acquired. Conduct such in-process inspections in a manner consistent with commercial practice. [§46.102 and §46.202-1, FAC 90-32, Case 94-790, CSW Unit 58, Task 3. Also CSW Unit 54 Task 5]

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Acceptance Based on Contractor Assurances Rather Than Inspection


 Although reserving the right of the Government to inspect deliverables that have been tendered for acceptance, the inspection and acceptance language in FAR §52.212-4(a) assumes that the Government (like commercial buyers generally) will accept items based on seller assurances that the commercial item tendered for acceptance conforms to the contract requirements.¹ This assumption might not be valid when acquiring complex commercial items or commercial items used in critical applications. In such cases, the contracting officer shall include alternative inspection procedure(s) in an addendum and ensure these procedures and the postaward remedies adequately protect the interests of the Government. [§12.402, 46.102, and §52.212-4(a), FAC 90-32, Case 94-970 CSW Unit 58, Task 3. Also CSW Unit 54 Task 7.]


 Contracting officers may investigate complaints by subcontractors or suppliers that a prime contractor did not pay them for their work as provided by the payment terms of the subcontract, purchase order, or other agreement. If the complaints are valid, contracting officers may —

- Encourage the contractor to make timely payment to the subcontractor or supplier; or
- If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor. (*This authority already exists and is not new — See Unit 69, “Administering Financing Terms and Conditions”*)

Also review the contractor's certifications of payment to those subcontractors or suppliers, if any such certifications had been submitted with payment requests to the Government. If the certification is inaccurate in any material respect, initiate administrative or other remedial action. [§32.112-1, FAC 90-32, Case 94-762, CSW Unit 58, Tasks 3 and 4.]

Laws Applicable To Contractors For Contracts Awarded Under Part 12

 Contracts for commercial items do not include clauses related to the Clean Air Act, the Federal Water Pollution Control Act, or the Contract Work Hours and Safety Standards Act. Hence, contractors no longer have to submit the certificates required by those clauses. However, the contractors must still comply with such laws or be in breach of contract. [§12.503(b) and 52.212-4(q), FAC 90-32, Case 94-970, CSW Unit 58, Part B]

 Moreover, contractors also must agree to comply with a number of laws unique to Government contracting — to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 327 et seq., Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 251 related to whistle blower protections; and 49 U.S.C. 40118, Fly American. [§12.503(b) and 52.212-4(r), FAC 90-32, Case 94-970, CSW Unit 58, Part B]

¹ This assumption is the reason that the clause does not provide for finality of acceptance and for the first time expressly gives the Government the benefit of implied warranties — see *Remedies*.

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✂ When acquiring commercial items, contractors do NOT have to require their employees to individually certify that they are (1) familiar with the Procurement Integrity Act and (2) will report violations of the Act. (§3.104-9 and 52.203-8, FAC 90-30, Case 94-804, CSW Unit 58, Part B]

Protecting Contractor Employee Whistleblowers (CSW Unit 58, New Part).

✎ FAR Subpart 3.9 implements the whistleblower protections for contractor employees established by sections 6005 and 6006 of the Federal Acquisition Streamlining Act (FASA). This subpart establishes remedies for contractor employees who are discharged, demoted or otherwise discriminated against as a reprisal for disclosing a substantial violation of law related to a contract to an “authorized official of an agency”, an authorized official of the Department, of Justice, or a member of Congress. No clause is prescribed or necessary to make these remedies available to contractor employees. Previously these protections were available only to contracts awarded under title 10 of the United States Code (e.g., by Defense agencies).

For the purpose of this subpart, an “authorized official of an agency” means any officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract. If you are an authorized official under this subpart:

- Document (in the form of memoranda for record) disclosures made by contractor employees concerning substantial violations of law related to agency contracts. Report this matter to appropriate agency officials, e.g. the Inspector General (IG), a criminal investigator, procurement fraud advisor etc.
- If such advice is requested, advise contractor employees of their rights under FAR subpart 3.9.
- Refer contractor employee complaints of reprisal actions to the IG. [FAC 90-30, Case 94-803]

Contractor employees may seek relief under FAR subpart 3.9 when they:

- Have disclosed a substantial violation of law to:
 - ◊ A member of Congress,
 - ◊ An authorized official of an agency (e.g., an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or contract), or
 - ◊ An authorized official of the Department of Justice.
- As a result of the disclosure, can show that a reprisal action was taken against them.
- Report the reprisals to the IG of the agency that awarded the contract.

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FAR subpart 3.9 establishes the following investigative process.

1. The contractor employee complains to the IG (the DoD IG for Defense contracts, rather than military service IGs).
2. The IG conducts an initial inquiry.
3. If the complaint merits further investigation, the IG notifies the complainant, contractor, and the Head of the Contracting Activity (HCA).
4. The IG investigates and reports its findings to agency head or designee, with copies of the "Report of Findings" to the complainant, contractor, and HCA.
5. Both the complainant and Contractor have opportunity to respond in writing to Report of Findings to the agency head or designee. Responses must be filed within 30 days (unless the agency head or designee extends the response time).

If the agency head or designee finds for the complainant, the agency head or designee may direct the contractor to do any or all of the following.

1. Take action to abate the reprisal.
2. Reinstate the employee to the position held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would have applied if the reprisal had not been taken.
3. Pay all costs and expenses (including attorneys' fees and expert witnesses' fees) reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

If the contractor fails to comply with order, the agency head may request the Department of Justice to file action for enforcement in U.S. District Court for the district in which the reprisal occurred. The agency head's action is subject to legal review and appeal within the Federal Court system.


FAR subpart 3.9 applies to contracts in existence as of September 19, 1995, for reprisals to Government contractor employees occurring on or after that date. It does not apply to contracts otherwise covered by provisions of 10 U.S.C. 2409a. [FAC 90-32, Case 94-803 — Technical amendment to final rule.]


FUNCTION BY FUNCTION CHANGES

Delays

Contract Specialist Workbook, Unit of Instruction 59

Delays In Performance Under Contracts For Commercial Items


 Under FAR §52.212-4, contractors must notify the Government when there will be an excusable delay — “in writing as soon as it is reasonably possible”. Contractors cannot use “excusable delay” as a defense if they fail to notify the Government about the excusable delay when it occurred. The only exception is if the contractor actually was not able to notify the Government immediately (e.g., delay due to a fire or flood). [§52.212-4(f), FAC 90-32, Case 94-970, CSW Unit 59, Tasks 1 and 2]

 Reasons for excusable delay are broader and more lenient under FAR §52.212-4 than under the default clauses prescribed by Part 49. The test changes from “causes beyond the control and without the fault or negligence” to “beyond the **reasonable** control of the Contractor and without its fault or negligence”. In particular, FAR §52-212-4 expressly cites “delays of common carriers” as justifying a finding of excusable delay under 52.212-4, which is NOT a cited justification in Part 49 clauses. [§52.212-4(f), FAC 90-32, Case 94-970, CSW Unit 59, Task 2]

Remedies

Contract Specialist Workbook, Unit of Instruction 61

Available Remedies in Contracts for Commercial Items


 The clause at FAR §52.212-4, “Contract Terms and Conditions - Commercial Items”, provides the following remedies (expressly or implicitly):

- Rejection of non-conforming supplies or services before **or after** acceptance (§52.212-4(a))
- Redress for breach of the implied warranty of merchantability or fitness. (§52.212-4(o))
- Termination for cause. (§52.212-4(m))

However, where consistent with commercial practice, contracting officers may tailor this clause with respect to terms and conditions for inspection and acceptance and warranties. In particular, the FAR encourages offerors to offer the Government at least the same express warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. [§12.402, 46.709, and §52.212-4(a), (m), and (o), FAC 90-32, Case 94-970, CSW Unit 61, Task A2]

FUNCTION BY FUNCTION CHANGES


Rejection of Nonconforming Supplies or Services Before or AFTER Acceptance

 §52.212-4(a) authorizes the Government to require repair or replacement of nonconforming supplies and reperformance of nonconforming services at no increase in contract price. However, the Government can exercise this authority **after acceptance** only if it acts:

- Within a reasonable time after the defect was discovered or should have been discovered; and
- Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item


Unlike the more traditional inspection and acceptance clauses required for non-commercial contracts by FAR Parts 14 and 15, FAR §52.212-4(a) does NOT make acceptance final for patent defects. This is in keeping with the customary commercial practice of accepting items based on seller assurances rather than on buyer inspection. [§52.212-4(a), FAC 90-32, Case 94-970, CSW Unit 61, Task D1]

Implied Warranties

 FAR §52.212-4(o) includes the warranties of “merchantability” and “fitness for a particular purpose”. These are two of the “implied warranties” in the Uniform Commercial Code (UCC). §52.212-4 does not incorporate other UCC implied warranties (e.g., the implied warranty arising from course of dealing or trade usage) — but a contracting officer by tailoring can incorporate such warranties where consistent with commercial practice. Likewise, the contracting officer can agree to terms that disclaim an implied warranties.

This is the first time that any UCC warranties have been recognized in the FAR. [§12.404 and §52.212-4(o), FAC 90-32, Case 94-970, CSW Unit 61, Task F1]

Merchantability

 Under FAR §12.404, “merchantable” means that an item is reasonably fit for the ordinary purposes for which such items are used. The item must be of at least average, fair or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description. [FAR §12.404(a)(1)]

FUNCTION BY FUNCTION CHANGES

The UCC at §2A-212 provides that goods are merchantable only if the goods —

- Pass without objection in the trade under the description in the contract.
- If fungible, are of fair average quality within the description.
- Are fit for the ordinary purposes for which goods of that type are used.
- Run, within the variation permitted by the contract, of even kind, quality, and quantity within each unit and among all units involved.
- Are adequately contained, packaged, and labeled as the contract may require.
- Conform to any promises or affirmations of fact made on the container or label.

The contractor has the following possible defenses under commercial law (UCC §2A-214) against a claim that a defect is covered by the implied warranty of merchantability:

- The warranty was specifically disclaimed in the contract, as tailored (e.g., by the terms of any express warranty incorporated as an addendum).
- The buyer agreed to a sale on an “as is” or “with all faults” basis.
- Before entering into the contract, the buyer examined the goods or a sample or model thereof as fully as desired, in which case there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.
- Before entering into the contract, the buyer refused the seller’s demand that the buyer examine the goods (or a sample or model thereof), in which case there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.

The extent to which Boards of Contract Appeals and the courts will consider UCC language and precedents related to implied warranties is as of yet unknown. Past Boards have turned to the UCC for guidance in determining the Government’s post-acceptance rights where the Part 52 inspection and acceptance clauses were neither required nor incorporated in the contract (e.g., in response to claims by the Government with respect to items acquired through small purchase procedures for which no Part 52 inspection and acceptance clause was required or had been incorporated in the purchase order). Until the Boards rule otherwise, contracting officers probably should look to commercial law for guidance on this warranty.

FUNCTION BY FUNCTION CHANGES

Fitness for a Particular Purpose



The warranty of fitness for particular purpose applies when—

- The seller knows the particular purpose for which the Government intends to use the item; and
- The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose. [FAR §12.404(a)(2)]

Disclaiming the Implied Warranties



Contractors may try to exclude or limit implied warranties contained in §52.212-4(o). Industry buyers often use purchase orders (i.e., make the offer) that explicitly or implicitly include UCC implied warranties. Sellers generally disclaim the implied warranties in their letters of acceptance. This is known as the “battle of the forms.” In such cases, courts invariably rule that the implied warranties stand and that disclaimers are NOT part of the contract. Hence, determine customary practice based on the contract — the terms of sale actually upheld by the courts.

When researching the market for a deliverable, determine whether contracts customarily disclaim the implied warranties. However, agree to disclaim the implied warranties **ONLY IF** the proposed “express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance”. [FAR §12.404(b)(2)]

Express Warranties



When soliciting offers for commercial items, require (to the maximum extent practicable) offerors to propose at least the same warranty terms — including offers of extended warranties — customarily offered to the general public. You may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item.

The question is whether the offered warranty protects the Government's interests at least as well as the implied warranties (especially if an express warranty disclaims the implied warranties). Any express warranty must meet the needs of the Government. Before accepting the proposed commercial warranty, question whether:

- The warranty is adequate to protect the needs of the Government, considering such matters as coverage and length of the warranty.
- The proposed terms can be effectively administered (including the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information).
- The warranty is cost effective. [§12.404, FAC 90-32, Case 94-970, CSW Unit 61, Task E1]

FUNCTION BY FUNCTION CHANGES

Consequential Damages



Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defects or deficiencies in accepted items. Before incorporating this waiver of consequential damages, ensure that it is consistent with customary practice of the particular industry. [§52.212-4(p), FAC 90-32, Case 94-970, CSW Unit 61, Task E2]

Property Administration

Contract Specialist Workbook, Unit of Instruction 62

Electronic Inventory Schedules



Contractors may electronically reproduce standard inventory schedule forms, as long as they make no change to the name, content, or sequence of the data elements. Check to ensure that the electronic reproduction includes all essential elements of data and is signed. [§45.606-5, FAC 90-29, Case 91-104, CSW Unit 62, Task 3]

Evaluating Contractor Performance

Contract Specialist Workbook, Unit of Instruction 63

Requirements For Formal Evaluations



When work on the contract is completed, prepare an evaluation of contractor performance for each contract in excess of:

- \$1,000,000 beginning July 1, 1995,
- \$500,000 beginning July 1, 1996, and
- \$100,000 beginning January 1, 1998


Exceptions:

- Contracts awarded under Subparts 8.6 and 8.7.
- Construction and A&E contracts (see §36.201 and 36.604 for policies on recording performance under such contracts).

FUNCTION BY FUNCTION CHANGES

Also prepare interim evaluations for multiple year contracts as specified by the agency. [FAR subpart 42.15, FAC 90-26, CSW Unit 63, New Tasks]


Past Performance Information Defined

 Past performance information is information that is relevant to future source selections on a contractor's actions under previously awarded contracts. Record information on such matters as the contractor's:


- Record of conforming to contract requirements and to standards of good workmanship.
- Record of forecasting and controlling costs.
- Adherence to contract schedules, including the administrative aspects of performance.
- History of reasonable and cooperative behavior and commitment to customer satisfaction.
- Business-like concern in general for the interest of the customer.

Generally solicit input for the evaluations from the technical office, contracting office, and, where appropriate, end users of the product or service. [FAR subpart 42.15, FAC 90-26, CSW Unit 63, New Tasks]

Contractor Feedback On Evaluations

 Provide copies of the agency evaluation of the contractor's performance to the contractor as soon as practicable after completing the evaluation. Give the contractor at least 30 days to comment on the evaluation. If the parties disagree about the evaluation, refer the evaluation to a level above the contracting officer. However, the contracting agency makes the final decision. [FAR subpart 42.15, FAC 90-26, CSW Unit 63, New Tasks]

Access And Retention


 Retain copies of the evaluation, contractor response, and review comments (if any). Mark this information with the legend "Source Selection Information." Only release the evaluation to other Government personnel and the contractor whose performance is being evaluated. Destroy the evaluation within three years after completion of contract performance. [FAR subpart 42.15, FAC 90-26, CSW Unit 63, New Tasks]

FUNCTION BY FUNCTION CHANGES

Payment

Contract Specialist Workbook, Unit of Instruction 65

Payment Terms In Contracts Under Part 12

 See FAR §52.212-4 (g) and (I) for invoice and payment terms and conditions in contracts for commercial items. [§12.212-4, FAC 90-32, Case 94-790, CSW Unit 65]

Certification of Indirect Cost Proposals

\$ Section 42.703-2 extends requirements for contractor certification of indirect cost rates (both billing and final) to the civilian agencies. Pursuant to 10 U.S.C. 2324(h), the Department of Defense already determines or negotiates contractor indirect cost rates on the basis of a certified proposal. Basically, contracting officers may not agree to billing or final indirect cost rates unless the contractor has certified (using the clause at 52.242-4, Certification of Indirect Costs) that:

- All proposed costs are allowable
- None are unallowable, AND
- All costs included in the proposal are properly allocable to Government contracts on the basis of a beneficial or causal relationship between the expenses incurred and the contracts to which they are allocated in accordance with applicable acquisition regulations. [§42.703-1 and 52.242-4, FAC 90-31, Case 94-752, CSW Unit 65, Part B, New Task]

\$ The head of the agency or designee may waive the certification when in the interest of the United States. However, they must put the reasons for the waiver in writing and make those reasons available to the public. For example, waivers might be appropriate for contracts with foreign governments, international organizations, State or local governments subject to OMB circular A-87, educational institutions subject to OMB circular A-21, and non-profit organizations subject to OMB circular A-122. [§42.703-1, FAC 90-31, Case 94-752]

\$ If necessary for continuation of the contract, contracting officers can unilaterally establish the rates if the contractor fails to certify its proposal for billing or indirect cost rates. [§42.703-1, FAC 90-31, Case 94-752, CSW Unit 65, Part B, New Task]

FUNCTION BY FUNCTION CHANGES

Determining Final Indirect Cost Rates

\$ If the contracting officer is responsible for determining final indirect cost rates, the FAR prohibits the contracting officer from resolving any questioned costs until obtaining—

- Adequate documentation on the costs; and
- The contract auditor's opinion on the allowability of the costs.

The FAR further advises contracting officers, whenever possible, to invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

Finally, the FAR adds a specific requirement that the contracting officer notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance. [§42.705-1, FAC 90-31, Case 94-754, CSW Unit 65, Part B, Task 3]

\$ The FAR now requires that contracting officers use, not merely take into consideration, established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established. [§42.703-1, FAC 90-31, Case 94-754, CSW Unit 65, Part B, Task 5]

Unallowable Costs

Contract Specialist Workbook, Unit of Instruction 66

Penalties for Submission of Unallowable Costs

\$ Sections 2101 and 2151 of FASA:

- Extend DoD's authority to assess penalties to all executive agencies.
- Change the contract value threshold for assessment of penalties on unallowable costs from \$100,000 to \$500,000.

With the exception of the threshold value, the penalty provisions in the new law are the same as those implemented in the current Defense Federal Acquisition Regulation Supplement. [§42.709 and 52.242-3, FAC 90-31, Case 94-751, CSW Unit 66, New Task]

FUNCTION BY FUNCTION CHANGES

\$ Unless a waiver is granted, Contracting officers shall assess penalties against contractors for including expressly unallowable indirect costs in—

- Final indirect cost rate proposals; or
- The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

However, this policy only applies to contracts in excess of \$500,000 — and does NOT apply to fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items. [§42.709 and 52.242-3, FAC 90-31, Case 94-751, CSW Unit 66, New Task]

\$ The penalty is equal to the amount of the disallowed costs plus interest on the paid portion, if any, of the disallowance. However, if the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is double that amount. Any of the following may constitute evidence of prior determinations of unallowability:

- A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency.
- A contracting officer final decision which was not appealed.
- A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance.
- A determination or agreement of unallowability under 31.201-6. [§42.709 and 52.242-3, FAC 90-31, Case 94-751, CSW Unit 66, New Task]

\$ Determinations of penalty amounts under paragraphs (d) and (e) of the clause at 52.242-3 are final decisions within the meaning of the Contract Disputes Act of 1978. The FAR contains precise instructions for determining the amount of the interest, issuing assessments, and waiving the penalty. [§42.709 and 52.242-3, FAC 90-31, Case 94-751, CSW Unit 66, New Task]

Entertainment, Gift And Recreation Costs For Contractor Employees

\$ The costs of recreation are expressly unallowable with the exception of costs of company sponsored employee sports teams and employee organizations designed to improve company loyalty, team work, or physical fitness. The final rule retains the allowability of “wellness/ fitness centers” found in the interim rule. [§31.205-13, FAC 90-31, Case 94-750, CSW Unit 66, Task 1]

\$ The costs of gifts are expressly unallowable (31.205-13(b)). However, this does not apply to costs which meet the definition of, and are properly accounted for as, compensation or recognition awards under §31.205-6. [§31.205-13, FAC 90-31, Case 94-750, CSW Unit 66, Task 1]

FUNCTION BY FUNCTION CHANGES

\$ FAR 31.205-14, “Entertainment Costs”, incorporates FASA wording relating to the unallowability of entertainment costs under any other cost principle. This revision specifically disallows entertainment costs which some may have previously considered allowable. [§31.205-14, FAC 90-31, Case 94-750, CSW Unit 66, Task 1]

Lobbying, Foreign National Severance Costs, And Conventions

\$ The costs of sponsoring conventions are unallowable when “the principal purpose of the event is other than dissemination of technical information or stimulation of production.” [§31.205-1 and 205-43, FAC 90-31, Case 94-754, CSW Unit 66, Task 1]

\$ The FAR imposes additional restrictions on the allowability of severance costs for foreign nationals employed outside the United States. Under certain conditions, for instance, all severance costs are unallowable if the termination of employment of the foreign national is the result of the closing of a United States facility in that country at the request of the government of that country (or curtailment of activities at the facility under the same circumstances).

However, FAR §37.113 allows waivers of the restrictions. [§31.205-6, 37.113, 52.237-8, and 52.237-9; FAC 90-31, Case 94-754, CSW Unit 66, Task 1]

\$ The costs of lobbying local Governments are unallowable, in the same respect that such costs are unallowable at the State and Federal levels. [§31.205-22, FAC 90-31, Case 94-754, CSW Unit 66, Task 1]


Statutory Unallowables

\$ Sections 31.603 and 31.703 have been expanded to list 15 types of costs that are unallowable in statute. [§31.603 and 31.703, FAC 90-31, Case 94-754, CSW Unit 66, Task 1]

Assignment of Claims


Contract Specialist Workbook, Unit of Instruction 67

No Set-Off Commitments

 Agency heads can authorize a no set-off commitment (see 60 FR 52289, October 5, 1995) but only after publishing a “determination of need” in the Federal Register. [§31.8, FAC 90-33, Case 94-761, CSW Unit 67, Task 3]

FUNCTION BY FUNCTION CHANGES


In Commercial Contracts

 See FAR §52.212-4 (b) in contracts for commercial items for coverage of the Assignment of Claims Act. [§12.212-4, FAC 90-32, Case 94-790]

Administering Contract Financing Terms and Conditions

Contract Specialist Workbook, Unit of Instruction 69 (formerly “Progress Payments”)

Suspending Or Reducing Progress Payments Upon A Finding Of Fraud


 FAR 32.006 establishes policies for suspending or reducing progress payments upon a finding of fraud. The policies apply to all agencies but NASA and Coast Guard.

Under FAR 32.006, the agency head is responsible for determining whether there is substantial evidence that a requested payment is based on fraud (based on a report from the Inspector General or other agency official responsible for coordinating the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of procurement-related fraud or corruption). If the agency head determines that evidence of fraud is substantial, FAR 32.006 includes criteria for determining whether to reduce progress payments and by how much. [§32.006, FAC 90-33, Case 94-765, CSW Unit 69, Task A6]

FAR 32.006 also establishes a due process procedure for:

- Notifying the contractor that the agency is considering a reduction or suspension of payments for fraud, and
- Considering any rebuttal by the contractor.

Administering Progress Payments Based On Performance (NEW)

 The following are tasks related to administering such progress payments [§33.10, FAC 90-33, Case 94-764].

1. Identify intervals (i.e., not more frequently than monthly), the form, and the manner in which contractors shall request performance based financing payments.
2. Review contractor requests for performance-based finance payments. Do not pay unless the specified event or performance criterion has been successfully accomplished in accordance with the contract. If necessary, require the contractor to substantiate the event or performance criterion which has been or is represented as being payable. Accurately determine the amount to be paid.

FUNCTION BY FUNCTION CHANGES

3. Determine whether Government delay is responsible when the contractor falls short of an event or criterion. If there is a Government-caused delay, consider re-negotiating the performance-based payment schedule to facilitate contractor billings for any successfully accomplished portions of the delayed event or criterion.
4. Review information from performance monitoring to ensure that Government title is not compromised by other encumbrances (but ordinarily rely upon the contractor's certification contained in the payment request). If Government title has been compromised, initiate actions to protect the Government's interests (e.g., require additional protective provisions; consider suspending or reducing performance; consult legal counsel).
5. Determine whether to suspend or reduce performance based payments, as provided by §52.232-32(e).
6. Determine whether to demand repayment of performance based financing in the event of loss, theft, destruction, or damage to property per §52.232-32(g).
7. If the contract is modified, adjust the performance-based payment schedule.
8. Verify proper liquidation of performance-based finance payments.

Administering Commercial Financing Provisions (NEW)

1. **Monitor securities provided by contractors.** The value of the security must always equal or exceed the amount of unliquidated financing.
 - ◇ Determine the need for additional security.
 - ◇ Take action if the contractor fails to provide the additional security.
2. Review requests for payments and approve, if:
 - ◇ Amounts are properly calculated and otherwise due.
 - ◇ The items or services will be delivered or performed in accordance with all contract terms and conditions.
 - ◇ There has been no impairment or diminution of the Government's security. [§32.207, FAC 90-33, Case 94-764]

FUNCTION BY FUNCTION CHANGES

Defective Pricing

Contract Specialist Workbook, Unit of Instruction 73

Penalties


\$ When determining the downward adjustment for defective cost or pricing data, all Federal agencies (not just Defense agencies) are entitled to penalty amounts on overpayments resulting from defective cost or pricing data — but only if the contractor “knowingly” submitted defective cost or pricing data. The penalty amount is equal to the amount of overpayment made. Contracting officers are required to obtain the advice of counsel before imposing a penalty (presumably to determine if the government has sufficient evidence to substantiate an allegation that the contractor “knowingly” submitted the defective data). [§15.804-7(b) and §52.215-22, FAC 90-32, Case 94-721, CSW Unit 73, Task 7]

\$ The FAR now defines the date of overpayment (of significance in calculating interest) on **subcontracts** — namely, “the date payment was made to the prime contractor, based on prime contract progress billings or deliveries, which included payments for a completed and accepted subcontract item”. (Case 94-721)


Contract Modifications

Contract Specialist Workbook, Unit of Instruction 75

No Unilateral Changes To Commercial Item Contracts

 Contracts which include the clause at “52.212-4 Contract Terms and Conditions - Commercial Items” do NOT authorize unilateral changes (unless tailored to provide for such changes where consistent with commercial practice). Instead, the clause only allows bilateral agreements. [§52.212-4(c), FAC 90-32, Case 94-970, CSW Unit 75, Task A7]

Certifying Requests For Extraordinary Relief


 If seeking a contract adjustment that exceeds the simplified acquisition threshold, an authorized agent of the contractor now has to certify that (a) the request is made in good faith and (b) the supporting data are accurate and complete to the best of that person's knowledge and belief. [§33.214(b), FAC 90-32, Case 94-730, CSW Unit 75, Task C2]

FUNCTION BY FUNCTION CHANGES


Termination

Contract Specialist Workbook, Unit of Instruction 76

Terminating Contracts Under Part 12

 The Government retains the right to terminate both for cause and convenience under FAR 52.212-4, Contract Terms and Conditions - Commercial Items. Contracting officers may continue to use Part 49 as guidance ONLY to the extent that Part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4. [§12.403, FAC 90-32, Case 94-970, CSW Unit 76]

Part 12 Terminations For Convenience (NEW)


 FAR §52.212-4, *Contract Terms and Conditions - Commercial Items*, establishes a new basis for convenience termination settlements:

- Percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, PLUS
- Reasonable charges that the Contractor can demonstrate — to the satisfaction of the Government using its standard record keeping system — have resulted from the termination.

HOWEVER, do NOT pay the contractor for any work performed or costs incurred “which reasonably could have been avoided”.

For this purpose, the Contractor shall not be required to comply with the cost accounting standards nor with any contract cost principle. This paragraph does not give the Government any right to audit the Contractor’s records. [§12.403 & 52.212-4(1), FAC 90-32, Case 94-970, CSW Unit 76, New Tasks]

Part 12 Terminations For Cause (NEW)

 The Government may terminate for cause under FAR 52.212-4:

- In the event of any default by the Contractor, or
- If the Contractor fails to comply with any contract terms and conditions, or
- If the Contractor fails to provide the Government, upon request, with adequate assurances of future performance.

FUNCTION BY FUNCTION CHANGES

These are basically the same three causes in FAR Part 49 default clauses. [§52.212-4(m), FAC 90-32, Case 94-970]

✂ Cure notices are still required prior to terminating a contract for a reason other than late delivery. Show cause notices are not required but are permitted. [§12.403, FAC 90-32, Case 94-970]

✂ Contracting officers must terminate for cause by sending a written notice to the contractor. At a minimum, this notification shall—

- Indicate the contract is terminated for cause,
- Specify the reasons for the termination,
- Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy, and
- State that the notice constitutes a final decision of the contracting officer and that the contractor has the right to appeal under the Disputes clause (see 33.211). [§12.403, FAC 90-32, Case 94-970]

✂ FAR §52.212-4(m) states that, “in the event of termination for cause, the Government shall not be liable to the Contractor for any amount, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law.” §12.403 further stipulates that “the Government’s rights after a termination for cause shall include all the remedies available to any buyer in the market place” and that the “preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess procurement costs together with any incidental or consequential damages incurred because of the termination”. In commercial law, this remedy is known as “cover” (UCC §2-712). [§12.403 and §52.212-4(m), FAC 90-32, Case 94-970]

Under the UCC, other buyer’s rights and remedies include the following.

- Cancel and, with notice, rescind (UCC §2-711).
- Sue for breach of contract (UCC §2-713) if the seller repudiates the contract or fails to deliver (in which case the measure of recovery is the difference between the contract price and the market price of the goods at the time that the buyer learned of the breach). In this case, there is no procurement -- the buyer does without the deliverable.
- Exercise the right of replevin (UCC §2-716(3)) if the seller has the deliverable but refuses to make delivery (and the buyer cannot procure from another source).
- Sue for specific performance (UCC §2-715(1)) if the seller refuses to perform and the buyer cannot procure the deliverable from any other source.


FUNCTION BY FUNCTION CHANGES

Although the FAR does not specifically address this point, the Government will probably continue to have an obligation to mitigate or reduce the damages suffered (e.g., to promptly procure and at a fair and reasonable price). This is a principle common to both Government and commercial contract law.

Administering Bonds

Contract Specialist Workbook, Unit of Instruction 77

Requests For Information From Subcontractors


 If a contractor has furnished a payment bond pursuant to the Miller Act for a construction contract, promptly furnish upon request (orally or in writing) any of the following information to a current or prospective subcontractor/supplier.

- Name and address of the surety or sureties on the payment bond.
- Penal amount of the payment bond.
- Copy of the payment bond (The contracting officer may impose reasonable fees to cover the cost of copying and providing a copy of the payment bond.) [FAC 90-32, Case 94-762, CSW Unit 77, Task 2]


Claims

Contract Specialist Workbook, Unit of Instruction 78

Claims Under Part 12

 See FAR §52.212-4 (d) in contracts for commercial items for coverage of the Contract Disputes Act. [§12.212-4, FAC 90-32, Case 94-790, CSW Unit 78]

Certification Threshold

 The threshold for certifying a claim is now \$100,000. Contracting officer deadlines for issuing decisions on a claim reflect the new threshold of \$100,000 for certifying claims. Thresholds have also been increased to \$50,000 and \$100,000 respectively for the Board of Contract Appeals (BCA) small claim procedure and accelerated procedure. [§33.201, §33.207 and §33.211, FAC 90-32, Case 94-730, CSW Unit 78, Task 2]

FUNCTION BY FUNCTION CHANGES

Deadlines For Submitting Claims

☞ Claims must be submitted in writing within 6 years after accrual of the claim. This applies whether the contractor or the Government is the submitting party. “Accrual” means “the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.” [§33.201 and §33.206, FAC 90-32, Case 94-730, CSW Unit 78, Task 3]

If the claim is filed at the 7 year mark, the claim will not be payable even at agency discretion (save under FAR provisions for extraordinary relief). The parties can negotiate a shorter period than 6 years for filing claims after accrual. The 6-year period does NOT apply to :

- Contracts awarded prior to October 1, 1995.
- A Government claim based on a contractor claim involving fraud.

Requests For ADR

☞ If the contracting officer rejects a small business contractor’s request for ADR, the contracting officer must provide a written explanation to the contractor, citing “one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons...” Contractors have the same obligation if they reject the agency’s request for ADR. [§33.214(b), FAC 90-32, Case 94-730, CSW Unit 78, Task 5]

What might be a reason for rejecting a request for ADR? Reasons at 5 U.S.C. 572(b) include:

- The need for an authoritative or definitive decision on a particular issue that has “precedential value”, if the ADR proceeding is not likely to produce a result that is generally accepted as an authoritative precedent.
- When “maintaining established policies is of special importance”, the need to minimize variations among individual decisions — if ADR proceedings are not likely to provide consistent results.
- The matter significantly affects persons or organizations who are not parties to the ADR proceeding.

Expert Services

☞ There is a new exception for acquiring the services of experts for a current or “reasonably foreseeable” litigation or dispute. Among other things, this exception allows the Government to essentially name request a neutral mediator or arbitrator for ADR who is agreeable to both parties. See “*Competition Requirements*” for more details on this exception. [§6.302-3 Industrial mobilization; engineering, developmental, or research capability; or expert services, FAC 90-31, Case 94-701, CSW Unit 78, Task 5]

FUNCTION BY FUNCTION CHANGES